STUDY PAPER
ON
WRONGFUL INTERFERENCE WITH GOODS

ONTARIO LAW REFORM COMMISSION

EXECUTIVE SUMMARY

By:

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with David P. Paciocco

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EXECUTIVE SUMMARY

This Study Paper, written for the Ontario Law Reform Commission, examines critically the remedies available to those persons whose goods, or whose interests in goods, have been wrongfully interfered with by some other person.

Remedies for wrongful interference with goods is one of the most complex, intricate, and dispersed areas of law. Much of the law developed at a time when the requirements for commencing legal proceedings were quite different, and more complicated, from what they are today. The subject matter examined in the Study Paper includes very old legal causes of action, such as the action of replevin (to recover possession of goods), trespass to goods (which is concerned with the wrongful touching or taking of goods), and detinue (which deals with the wrongful withholding of goods). It also includes some relatively modern developments, such as the tort of conversion (which deals broadly with any dealing with goods in a manner inconsistent with the rights of the person entitled to them), the negligent causing of economic loss, and the tort of interference with a reversionary (or non-possessory) interest. The subject matter also includes the ancient self-help remedy of "recaption" (which is the taking of possession of goods by a person with a right to immediate possession of them), as well as other remedies concerning the recovery of goods.

The authors explore the complexities and deficiencies in the present law of remedies for wrongful interference with goods and conclude that, while radical reform is not necessary, the law needs to be amended by statute. Given the obvious overlap between many of the causes of action described above, and the fact that the rigid distinction between the property torts is essentially anachronistic since the abolition of the old "forms of action", which established rather artificial barriers to pursuing legal remedies, the authors make specific recommendations that seek to rationalize the law in this area. The Study Paper would retain much of the substance of the present law, but would make it more coherent as well as more consistent with the law and practice in closely related fields.

The Study Paper recommends that the law in the area should be dealt with by a statute that provides for a new tort called "wrongful interference with goods". The new tort includes the present actions of conversion, detinue, trespass to goods, injury to a reversionary interest in goods, negligence (if it results in loss or damage to goods) and, where appropriate,

damage or loss arising out of breach of contract. In addition, the draft statute contains several provisions that seek to modernize and rationalize the present law. Among the more notable provisions are those that will make the new tort of wrongful interference with goods far less a matter of strict liability, that is, liability in the absence of fault. The draft Act will allow a wrongdoer who is not a merchant to defend a lawsuit by showing that he or she made a reasonable mistake. In addition, the Act will permit a defendant to argue that the plaintiff's own actions contributed to the loss, so that any damages ordered to be paid by the defendant should be reduced. It also provides for the right of one wrongdoer to obtain some compensation from other wrongdoers who also caused the loss to the plaintiff.

The recovery of goods will be more readily available in a wider range of fact situations. The draft Act provides for a general right of recovery at all stages in a lawsuit. This general right of recovery will be available even in cases where the claimant does not have an immediate right to possession, so long as no one else with an interest in the goods objects to such recovery.

The draft Act also contains innovative provisions that seek to clarify and control the self-help remedy of recaption, or recovery, of goods. In particular, the risk of, and liability for, injury to the person from whom the goods are sought, or to that person's property, are placed squarely on the party who is attempting to recover the goods. Furthermore, the right of that party to recover goods from a home is severely restricted in order to avoid volatile confrontations that could lead to personal injury and property damage.

The recommendations made in the Study Paper attempt to create a new, more comprehensive scheme that better serves modern commercial and consumer interests.

SUMMARY OF RECOMMENDATIONS

1. A REMEDIES FOR WRONGFUL INTERFERENCE WITH GOODS ACT

The existing causes of action and defences for wrongful interference with goods should be gathered into a *Remedies for Wrongful Interference with Goods Act*, to be modelled on the *Judicial Review Procedure Act*, R.S.O. 1980, c.224.

2. CONTRIBUTORY FAULT PRINCIPLE FOR WRONGFUL INTERFERENCE ACTIONS

The law of the province should provide that, where a claimant for relief for wrongful interference has been found to be contributorily at fault, the court should apportion any monetary relief granted. A corresponding provision should be made for an allowance in cases where the goods have been recovered, either by judicial order or by self-help. This provision should be under the province's general law on contributory fault. (An illustrative provision is included for the purpose of consideration in the proposed *Remedies for Wrongful Interference with Goods Act*.)

3. CONTRIBUTION PRINCIPLE FOR WRONGFUL INTERFERENCE ACTIONS

The law of the province should provide for contribution between wrongdoers each of whom contributed to the wrongful interference of the contribution claimant. This provision should be under the province's general law on contribution, and should give the court wide discretion in determining the contribution, so that, in determining liability, the court should be able to take account of the position of each wrongdoer's transaction in any chain of transactions between the true owner and the claimant. (An illustrative provision is included for the purpose of consideration in the proposed *Remedies for Wrongful Interference with Goods Act*.)

4. *JUS TERTII* DEFENCE FOR WRONGFUL INTERFERENCE ACTIONS

The proposed *Remedies for Wrongful Interference with Goods Act* should provide, in all wrongful interference actions, whether based on

possession or not, for a *jus tertii* defence (the right of a third party) with the following characteristics:

(a) the third party should be identified, and provision made for joining him as a party to the action;

(b) if the third party is not joined, or, being joined, fails to defend, or disclaims an interest, the defence should not be sustainable; but in the last two cases the court may deprive the third party of any right of action against the defendant;

(c) the plaintiff should give particulars of his right or title and identify anyone who to his knowledge has or claims any interest in the goods;

(d) the plaintiff holds the proceeds of the action in trust for any third party who was not joined but who has a better right to the interest on which the plaintiff relied;

(e) where any third party who is not barred from doing so later sues the defendant, the defendant may claim an indemnity from the original plaintiff; and

(f) the *jus tertii* defence should be subject to contrary agreement.

5. ALLOWANCE FOR IMPROVEMENTS TO GOODS WRONGFULLY INTERFERED WITH

The proposed *Act* should provide that, where the goods have been improved, the court may make an allowance to a person who wrongfully interfered with the goods who was the improver or was a purchaser who derived title from the improver and who acted reasonably, in accordance with the following:

(a) the court should be provided with guidelines to assist it in determining reasonableness and whether or not to exercise its discretion;

(b) the court may make an allowance in the form of an order for physical separation of the improvements, and in making a monetary allowance shall award the lesser of the cost or value of the improvements, unless it considers this would be unfair to the person receiving the allowance; and

(c) in an action by a purchaser of improved goods against his seller based on failure of consideration, or for damages, the court shall make an allowance where appropriate.

6. DEFENCE FOR REASONABLE BELIEF IN ACQUISITION OF INTEREST

The proposed *Act* should provide for a defence that the defendant reasonably believed he had or was acquiring a legally recognized interest in the goods, subject to the following:

(a) the defence should not be available for merchants as that term is defined in the Ontario Law Reform Commission's *Report on Sale of Goods*;

(b) the defence should also be available in claims for contribution or for damages for breach of contract; and

(c) the defence should not prevent the recovery of the goods, but should require the court to make an allowance to the person from whom they were recovered equal to the lesser of the cost or the value of the goods.

7. RIGHT TO RECOVERY *IN SPECIE* WHETHER OR NOT RIGHT TO POSSESS

The proposed *Act* should provide that in an action for wrongful interference with goods a party may claim recovery of possession whether or not he has a right to immediate possession, subject to the following:

(a) he cannot be awarded possession where it is shown that some other person with an interest in the goods objects;

(b) subject to the Rules of Civil Procedure the person so objecting may be joined as a party to the action; and

(c) the successful party shall receive and hold the goods in trust for all persons with interests therein.

8. *PRIMA FACIE* RIGHT TO RECOVERY *IN SPECIE*

The proposed *Act* should provide that a successful party to an action for wrongful interference who has claimed recovery of possession shall be entitled, at his option, to an order for recovery unless the court is satisfied that some other disposition is more appropriate, the burden of which shall be on the party resisting the order. The court should be provided with guidelines to assist it in determining when some other disposition would be more appropriate.

9. INTERIM RECOVERY OF GOODS

The proposed *Act* should provide that, upon a showing of a *prima facie* case of wrongful interference with goods, the court shall make an order for interim recovery of goods unless satisfied that some other disposition is more appropriate. The court should be provided with guidelines to assist it in the exercise of such discretion.

10. CLARIFICATION OF SECTION 117 (2) OF THE *COURTS OF JUSTICE ACT, 1984*

Section 117(2) of the *Courts of Justice Act, 1984* should be clarified to indicate:

(a) that a moving party who is successful on a motion for interim recovery of goods, and is unsuccessful in the action, may be held liable in damages for any loss caused by the interim recovery of goods sustained by another party;

(b) conversely, a party who obtains possession of goods by setting aside an interim order and is unsuccessful in the action, may be liable in damages to the same extent as a moving party who obtains possession by virtue of an interim order.

11. AMENDMENT OF RULE OF CIVIL PROCEDURE 44.03

Rule of Civil Procedure 44.03 should be amended to clarify the court's power to order interim recovery of goods upon the moving party giving an undertaking as to damages.

12. USE OF FORCE BY SHERIFF IN ENFORCEMENT OF INTERIM AND FINAL ORDERS FOR RECOVERY OF POSSESSION

The law concerning the use of force by the sheriff in the enforcement of interim and final orders for recovery of possession should be the same as that concerning the use of force by him in the execution of process for the recovery of judgment debts as recommended in the Ontario Law Reform Commission's *Report on the Enforcement of Judgment Debts and Related Matters*, Part II (1981).

13. AMENDMENT OF RULE OF CIVIL PROCEDURE 44.07 (2)

Rule of Civil Procedure 44.07(2) should be amended to provide that the sheriff shall serve a copy of the order on the defendant and any person who to his knowledge or reasonable belief claims an interest in the goods.

14. EXAMINATION OF DEFENDANT WHERE SHERIFF ORDERED TO POSSESS GOODS

The power of the court to order the examination of the defendant or any other person should be made clear in cases where the sheriff is ordered to take possession of goods pursuant to an interim or final order for recovery of possession.

15. RECAPTION GENERALLY NO DEFENCE FOR INTERFERENCE WITH LAND OR GOODS

The proposed *Act* should provide that, subject to recommendation 16, in any action for interference with property, real or personal, it shall be no defence that the interference took place in the course of taking possession of goods the refusal to deliver possession of which would be a wrongful interference with the goods on the part of the person from whom the goods were taken or to be taken.

16. RECAPTION GENERALLY DEFENCE TO NOMINAL DAMAGES FOR TRESPASS TO LAND OR GOODS

The proposed *Act* should provide that, subject to recommendation 17, in any action for interference with property, real or personal, which is in the nature of an action for nominal damages arising out of trespass to goods or land *per se*, it shall be a defence that the interference took place in the course of taking possession of goods the refusal to deliver possession of which would be a wrongful interference with the goods on the part of the person from whom the goods were taken or to be taken.

17. RECAPTION NO DEFENCE TO NOMINAL DAMAGES ARISING OUT OF ENTRY INTO DWELLING

The proposed *Act* should provide that the defence established in recommendation 16 shall not be available in circumstances where the interference with property is entry into a dwelling house.

18. RECAPTION NO DEFENCE FOR INTERFERENCE WITH THE PERSON

The proposed *Act* should provide that, in any action for interference with the person, it shall not be a defence that the interference took place in the course of taking possession of goods the refusal to deliver possession of which would be a wrongful interference with the goods on the part of the person from whom the goods were taken or to be taken.

19. RIGHT TO DEFEND PEACEABLE POSSESSION EXCEPT AGAINST PERSON ENTITLED TO GOODS

The proposed *Act* should provide that a person in peaceable possession of goods shall be justified in using reasonable and necessary force in defence of that possession except against a person or someone acting by that person's authority the refusal to deliver possession of the goods to whom would be a wrongful interference with the goods.

20. RECAPTION RULES NOT WAIVABLE IN ADVANCE

The proposed *Act* should provide that the provisions of the sections concerning recaption (recommendations 15 through 19) shall operate notwithstanding any licence or consent, express or implied, granted or given prior to the commencement of an attempt to take possession of goods.

21. RECOVERY BY PERSON WITH POSSESSION OR RIGHT TO SAME AS IF OWNER

The proposed *Act* should provide that, in an action for wrongful interference with goods, any person with possession or the right to immediate possession should be able to claim monetary relief as if he were the owner of the goods, subject to the following:

(a) he shall not so recover to the extent that another interest holder objects;

(b) subject to the Rules of Civil Procedure the person so objecting may be joined as a party to the action; and

(c) the person with possession or the immediate right to possession shall receive and hold the proceeds of the action in trust for all persons with interests therein.

A similar provision should be made for a person proceeding with the written authority of another interest holder. Apart from these provisions, the proposed *Act* should provide that a person should only recover monetary relief for interference with his own interest.

22. RIGHT TO IMMEDIATE POSSESSION SUFFICIENT FOR TRESPASS CLAIMS

The proposed *Act* should provide that a right to immediate possession should be sufficient for actions for wrongful interference in the nature of trespass.

23. INTEREST SUFFICIENT FOR CONVERSION SUFFICIENT FOR DETINUE AND *VICE VERSA*

The proposed *Act* should provide that an interest sufficient for actions for wrongful interference in the nature of conversion should be sufficient for ones for wrongful interference in the nature of detinue, and *vice versa*.

24. REVERSIONARY INTEREST SUFFICIENT FOR CONVERSION CLAIM

The proposed *Act* should provide that a reversionary interest should be sufficient for an action for wrongful interference in the nature of conversion.

25. DELIVERY OR RECEIPT IN PLEDGE SUFFICIENT FOR CONVERSION

The proposed *Act* should provide that an interference with goods in the nature of a delivery or receipt by way of pledge should be sufficient interference for an action for wrongful interference in the nature of conversion.

26. WRONGFUL INTERFERENCE CLAIMS BY CO-OWNERS

The proposed *Act* should provide that a co-owner of goods may bring an action for wrongful interference if the interference would have been sufficient for such an action by him if he were the sole owner.

27. TWO YEAR LIMITATION PERIOD FOR GOOD FAITH INTERMEDDLERS WITH GOODS

The limitations of actions legislation of the province should provide that the limitation period for actions for wrongful interference with goods by persons without possession, against persons who were good faith purchasers of the goods for value, should be two years from the date of the first transaction in the chain of transactions leading to the defendant which, apart from the *Act*, would be styled a conversion, or the defendant's wrongful interference, whichever is the earlier.

28. RUNNING OF TIME FROM FIRST DISPOSITION OR DEFENDANT'S INTERFERENCE

Subject to recommendation 27, the limitations legislation should provide that in actions for wrongful interference with goods by persons without

possession the relevant limitation period should run from the date of the first transaction in the chain of transactions leading to the defendant which, apart from the *Act*, would be styled a conversion in the form of a disposition to a good faith purchaser for value, or the defendant's wrongful interference, whichever is the earlier.

29. EXPIRY OF LIMITATION PERIOD AND TITLE

The limitations legislation should provide that the expiry of the relevant limitation period for an action for wrongful interference with goods which, apart from the *Act*, would be styled a conversion. including an action by a holder of a reversionary interest, shall extinguish the title of a person without possession otherwise entitled to bring the action as against, but only as against, the person entitled to the benefit of the relevant period.

30. LIMITATION PERIODS NOT TO AVAIL THIEF OR RECEIVER

The limitations legislation should provide that a thief or receiver of stolen goods shall not be entitled to the benefit of any limitation period in respect of the goods stolen.

31. AMENDMENT TO *LANDLORD AND TENANT ACT*

Part IV of the *Landlord and Tenant Act*, R.S.O. 1980, c.232, should be amended to give a judge of the District Court power to hear a tenant's application for recovery of possession of goods or of their value from a landlord who wrongfully interfered with the tenant's goods.

32. AMENDMENT TO *CONSUMER PROTECTION ACT*, SECTION 23(1)

The *Consumer Protection Act*, R.S.O. 1980, c. 87, section 23 (1) should be amended to make it clear that the protection of section 23 (1) extends to security interests under the *Personal Property Security Act, 1989*, S.O. 1989, c. 16, s. 62(a).

33. *ACCESSIO*, *CONFUSIO* AND *SPECIFICATIO* ISSUES

Further study should be undertaken concerning effects on title to goods where they are attached to, mingled with, or transformed into other goods—sometimes called *accessio*, *confusio*, and *specificatio*.

DOCUMENT D'ÉTUDE

SUR

LES RECOURS EN CAS D'ATTEINTE À DES BIENS MEUBLES

Commission de réforme du droit de l'Ontario

SOMMAIRE

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Ontario

1989

La Commission de réforme du droit de l'Ontario a été constituée en vertu de la Loi sur la *Commission de réforme du droit de l'Ontario* avec pour mission de réformer le droit, les procédures et les institutions juridiques.

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SOMMAIRE

Le présent document d'étude réalisé pour le compte de la Commission de réforme du droit de l'Ontario, constitue une étude critique des recours disponibles en cas d'atteinte aux biens meubles d'une personne ou aux intérêts qu'elle possède à leur égard, c'est-à-dire lorsque ces biens ou ces intérêts font l'objet d'une ingérence de la part d'un tiers.

Les recours en cas d'atteinte à des biens meubles forment l'un des domaines à la fois les plus complexes et les plus diffus du droit. Ce domaine est régi par un ensemble de règles issues d'une époque où les modalités d'introduction d'une instance étaient toutes autres et passablement plus compliquées qu'à l'heure actuelle. Le présent document examine notamment les anciens droits d'action comme l'action en replevin (visant la restitution de biens meubles), l'action pour atteinte à la possession mobilière (découlant du fait d'avoir illicitement touché ou pris des biens meubles) et l'action pour détention illicite de biens meubles. Le document se penche également sur les manifestations plus récentes dans ce domaine du droit, comme le délit d'appropriation illicite (découlant d'un traitement de biens meubles incompatible avec les droits des personnes à qui ils reviennent), la provocation négligente d'une perte financière et l'atteinte à un intérêt réversif (ou à un intérêt non possessoire). On y trouve également une analyse de l'ancien recours extra-judiciaire de reprise de possession (soit la prise de possession de biens meubles par une personne possédant un droit de possession immédiate à l'égard de ces biens), ainsi que de divers recours visant la restitution de biens meubles.

Les auteurs examinent les complexités et les lacunes propres aux recours actuels en matière d'atteinte à des biens meubles et en viennent à la conclusion que, même si une refonte globale ne s'impose pas, il convient néanmoins de modifier les règles de droit par voie législative. Étant donné que les causes d'action susvisées se recoupent inévitablement et que l'abolition des anciennes actions a rendu désuètes les distinctions rigides et artificielles existant entre les différentes formes de délit, les auteurs ont formulé des recommandations spécifiques tendant à rendre les règles plus cohérentes dans ce domaine. Ainsi, selon le document de travail, quoique le fond des règles serait appelé en grande partie à subsister, il y aurait cependant lieu de les harmoniser avec les règles et la pratique propres à certains domaines connexes du droit.

Le document de travail recommande que les règles de droit dans ce domaine soient énoncées dans une loi et que celle-ci institue un délit

nouveau intitulé "atteinte à des biens meubles". Ce nouveau délit regrouperait les actions actuelles fondées sur l'appropriation illicite (*conversion*), la détention illicite (*detinue*), l'atteinte à la possession mobilière (*trespass to goods*), l'atteinte à un intérêt réversif, la négligence (entraînant la perte de biens meubles ou des dommages à ceux-ci) et, dans les cas appropriés, les dommages ou les pertes issues de l'inexécution d'un contrat. De plus, la loi proposée comporte plusieurs dispositions de nature à moderniser et rationaliser le droit actuel. Parmi les plus importantes, citons celles qui auront pour effet de diminuer l'importance de la responsabilité stricte, c'est- à-dire la responsabilité sans égard à la faute, en ce qui a trait au nouveau délit d'atteinte à des biens meubles. La loi proposée permettra à l'auteur d'un délit qui n'est pas commerçant de se défendre dans une poursuite en faisant la preuve qu'il a commis une erreur raisonnable. La loi proposée permettra par ailleurs à un défendeur d'alléguer que le demandeur est en partie responsable de ses propres pertes, de façon à faire réduire éventuellement les dommages-intérêts que le défendeur pourrait être condamné à payer. La loi proposée accorde également le droit à l'auteur d'un délit de se faire dédommager par d'autres personnes responsables des pertes subies par le demandeur.

La restitution de biens meubles pourra, de plus, s'obtenir plus facilement dans des circonstances également élargies. La loi proposée prévoit le droit d'obtenir la restitution des biens à toutes les étapes d'une poursuite. Ce droit général de restitution pourra même être invoqué dans les situations où le réclamant n'a même pas droit à la possession immédiate des biens, à condition, toutefois, que le titulaire d'un autre intérêt sur ces biens ne s'y oppose pas.

La loi proposée innove en ce qu'elle cherche à préciser l'étendue et à régir l'application du recours extra-judiciaire de reprise de possession visant à récupérer des biens meubles. Plus précisément, la loi proposée prévoit clairement que c'est à la partie qui cherche à récupérer les biens d'assumer les risques que comporte un tel recours ainsi que de répondre du préjudice occasionné à la personne auprès de qui il cherche à récupérer les biens. En outre, le droit d'une partie de reprendre possession des biens au domicile d'une autre personne est fortement limité de façon à éviter les risques d'affrontement entraînant des blessures corporelles et des dommages matériels.

En somme, les recommandations formulées dans le document de travail visent à élaborer un ensemble de règles suffisamment complet qui puisse mieux répondre aux intérêts des commerçants et des consommateurs.

SOMMAIRE DES RECOMMANDATIONS

1. LOI SUR LES ATTEINTES AUX BIENS MEUBLES

Les droits d'action et les moyens de défense qui s'appliquent à l'heure actuelle en matière d'atteinte à des biens meubles devraient tous être énoncés dans une seule loi intitulée *Loi sur les atteintes aux biens meubles* et qui s'inspirerait de la *Loi sur la procédure de révision judiciaire*, L.R.O. 1980, c. 224.

2. APPLICATION DU PRINCIPE DE LA FAUTE CONTRIBUTIVE EN MATIÈRE D'ATTEINTE À DES BIENS MEUBLES

Le droit de la province devrait prévoir que, dans l'évaluation de l'indemnité à accorder, le tribunal devrait tenir compte, le cas échéant, de la faute contributive du réclamant. De façon analogue, il devrait y avoir une disposition prévoyant les cas où les biens meubles ont été récupérés, soit par ordonnance judiciaire ou par voie extra-judiciaire. Pareille disposition s'insérerait dans les dispositions législatives de la province concernant la faute contributive. (La *Loi sur les atteintes aux biens meubles* proposée comporte le libellé d'une telle disposition à titre indicatif.)

3. APPLICATION DU PRINCIPE DE LA RESPONSABILITÉ PARTAGÉE AUX ATTEINTES À DES BIENS MEUBLES

Le droit de la province devrait permettre de répartir la responsabilité d'une atteinte à des biens meubles entre les différents coauteurs de l'atteinte. Cette disposition s'insérerait parmi les dispositions législatives de la province concernant généralement le partage de responsabilité et conférerait aux tribunaux le pouvoir de déterminer la part de responsabilité à attribuer, en tenant compte notamment du rôle de chacun des coauteurs dans la série d'opérations intervenues entre le propriétaire véritable et le réclamant. (La *Loi sur les atteintes aux biens meubles* proposée comporte le libellé d'une telle disposition à titre indicatif.)

4. OPPOSABILITÉ DES EXCEPTIONS POUVANT ÊTRE SOULEVÉES PAR UN TIERS

La *Loi sur les atteintes aux biens meubles* proposée devrait permettre d'invoquer l'exception bénéficiant à un tiers dans toutes les actions pour

atteinte à des biens meubles, peu importe si ces actions sont fondées sur la possession ou non, pourvu, toutefois, que les conditions suivantes soient réunies :

(a) l'identité du tiers en cause devrait être révélée et il devrait être possible de le constituer partie à l'action;

(b) si le tiers n'est pas constitué partie à l'action, ni en voie de l'être, et s'il ne présente pas de défense ou décline tout intérêt, l'exception devrait être rejetée; par ailleurs, dans ces deux derniers cas, le tribunal pourrait lui refuser le droit de poursuivre le défendeur;

(c) le demandeur devrait être tenu d'expliciter son droit ou son titre et de révéler l'identité de toute personne qui, à son avis, possède ou revendique un intérêt sur les biens meubles;

(d) le demandeur détient le montant obtenu en justice à titre de fiduciaire pour le compte de toute personne étrangère à l'action mais possédant un intérêt supérieur au sien;

(e) lorsqu'une tierce partie reste libre par la suite de poursuivre le défendeur, ce dernier peut, le cas échéant, se faire dédommager par le demandeur primitif;

(f) l'exception devrait pouvoir être écartée par convention expresse.

5. COMPENSATION POUR AMÉLIORATIONS À DES BIENS MEUBLES AYANT FAIT L'OBJET D'UNE ATTEINTE

La *Loi* proposée devrait prévoir que lorsque l'auteur d'une atteinte à des biens meubles y a apporté des améliorations, le tribunal peut accorder une certaine indemnité à la personne qui a apporté les améliorations ou à la personne qui par la suite a acheté les biens améliorés et s'est comportée de façon raisonnable, en tenant compte des modalités d'application suivantes :

(a) le tribunal devrait bénéficier de lignes directrices lui permettant de déterminer le caractère raisonnable de l'opération en cause et de décider s'il y a lieu d'exercer son pouvoir discrétionnaire;

(b) le tribunal peut accorder une compensation sous forme d'une ordonnance de séparation physique des améliorations et, en ce qui concerne le montant de l'indemnité, le tribunal peut fixer un montant correspondant aux dépenses ou à la valeur des améliorations, selon le moindre des deux, sauf s'il estime

que cela serait injuste pour la personne à qui l'indemnité est destinée;

(c) dans une action intentée par l'acquéreur des biens meubles améliorés contre le vendeur pour cause d'insuffisance de la contrepartie ou en recouvrement de dommages-intérêts, le tribunal peut accorder une indemnité dans les cas méritoires.

6. CROYANCE RAISONNABLE D'ACQUISITION D'UN INTÉRÊT

La *Loi* proposée devrait permettre au défendeur d'invoquer pour sa défense qu'il croyait raisonnablement avoir ou être en train d'acquérir un intérêt juridiquement reconnu dans les biens meubles, sous réserve des conditions suivantes :

(a) ce moyen de défense ne devrait pas pouvoir être invoqué par des marchands au sens où ce terme s'entend dans le rapport de la Commission de réforme du droit de l'Ontario intitulé *Report on the Sale of Goods*;

(b) ce moyen de défense devrait être disponible dans les cas de demandes de partage de responsabilité ou de recouvrement de dommages-intérêts pour inexécution de contrat;

(c) ce moyen de défense ne devrait pas faire obstacle à la restitution des biens, mais plutôt entraîner l'obligation pour le tribunal d'accorder à la personne tenue de faire restitution un montant égal aux dépenses ou à la valeur des biens meubles, selon le moindre des deux.

7. DROIT DE RESTITUTION DES BIENS MEUBLES SANS ÉGARD AU DROIT DE POSSESSION

La *Loi* proposée devrait permettre à une partie à une action pour atteinte à des biens meubles de demander la restitution des biens meubles en cause, peu importe s'il a droit ou non à la possession immédiate de ceux-ci, pourvu, toutefois, que les conditions suivantes soient réunies :

(a) la possession des biens meubles ne peut lui être accordée lorsqu'il est démontré qu'une autre personne possédant un intérêt sur ces biens s'y oppose;

(b) sous réserve des Règles de procédure civile, la personne qui conteste la restitution peut être constituée partie à l'action;

(c) la partie qui obtient gain de cause reçoit et détient les biens

meubles en fiducie pour toutes les personnes possédant un intérêt sur ceux-ci.

8. DROIT PRIMA FACIE DE RESTITUTION DES BIENS MEUBLES

La *Loi* proposée devrait permettre à la partie qui obtient gain de cause dans une action pour atteinte à des biens meubles et qui demande qu'on lui remette les biens en cause, d'obtenir, si elle le désire, une ordonnance de restitution, sauf si le tribunal est convaincu qu'un autre moyen de redressement serait plus indiqué, ce que doit établir d'ailleurs la partie qui s'oppose à l'ordonnance. Le tribunal devrait bénéficier de lignes directrices lui permettant de déterminer les situations dans lesquelles un autre mécanisme de redressement serait plus indiqué.

9. RESTITUTION PROVISOIRE

La *Loi* proposée devrait permettre au tribunal d'ordonner, lorsqu'il est établi de prime abord qu'il y a eu atteinte à des biens meubles, la restitution provisoire des biens en cause, sauf s'il estime qu'un autre mécanisme de redressement serait plus indiqué. Le tribunal devrait bénéficier de lignes directrices lui permettant de déterminer les situations qui se prêtent à l'exercice de ce pouvoir discrétionnaire.

10. MODIFICATIONS VISANT À PRÉCISER L'ARTICLE 117(2) DE LA LOI DE 1984 SUR LES TRIBUNAUX JUDICIAIRES

L'article 117(2) de la *Loi de 1984 sur les tribunaux judiciaires* devrait être modifié afin de prévoir expressément que :

(a) la partie qui obtient, par voie de motion, la restitution provisoire de biens meubles, mais qui se fait débouter dans l'action, peut avoir à répondre en dommages-intérêts de tout préjudice occasionné à l'autre partie par la restitution provisoire des biens meubles;

(b) à l'inverse, la partie qui obtient possession des biens meubles en faisant annuler une ordonnance de restitution provisoire, mais qui se fait débouter dans l'action, peut avoir à répondre en dommages-intérêts au même titre que l'auteur de la motion qui obtient la possession des biens aux termes d'une ordonnance de restitution provisoire.

11. MODIFICATION DE LA RÈGLE DE PROCÉDURE CIVILE 44.03

La règle de procédure civile 44.03 devrait être modifiée afin de préciser le pouvoir du tribunal d'accorder une ordonnance de restitution provisoire lorsque la partie intéressée s'engage à répondre en dommages-intérêts.

12. USAGE DE LA FORCE PAR LE SHÉRIF LORS DE L'EXÉCUTION FORCÉE D'UNE ORDONNANCE DE RESTITUTION PROVISOIRE OU DÉFINITIVE

Le règles de droit relatives à l'usage de la force par le shérif lors de l'exécution forcée d'ordonnances de restitution provisoires ou définitives devraient être identiques à celles qui s'appliquent lors de l'exécution forcée de créances constatées par jugement, conformément aux recommandations émises à ce sujet par la Commission de réforme du droit de l'Ontario dans son rapport intitulé *Report on the Enforcement of Judgment Debts and Related Matters, Part II (1981)*.

13. MODIFICATION DE LA RÈGLE DE PROCÉDURE CIVILE 44.07(2)

La règle de procédure civile 44.07(2) devrait être modifiée de façon à prévoir l'obligation pour le shérif de signifier une copie de l'ordonnance au défendeur et à toute autre personne qui, à sa connaissance ou selon son avis raisonnable, revendique un intérêt sur les biens meubles.

14. INTERROGATOIRE DU DÉFENDEUR EN CAS D'EXÉCUTION D'UNE ORDONNANCE DE RESTITUTION PAR LE SHÉRIF

Il y aurait lieu d'énoncer en termes précis le pouvoir du tribunal de contraindre le défendeur ou toute autre personne à un interrogatoire lorsque le shérif est tenu de procéder à la saisie de biens meubles suite à une ordonnance de restitution provisoire ou définitive.

15. PRINCIPE GÉNÉRAL D'INOPPOSABILITÉ DE LA DÉFENSE DE REPRISE DE POSSESSION DANS UNE ACTION POUR ATTEINTE À DES BIENS MEUBLES OU IMMEUBLES

La *Loi* proposée devrait prévoir, sous réserve de la recommandation 16, l'inopposabilité dans une action pour atteinte à des biens meubles ou immeubles, de la défense de reprise de possession fondée sur le fait que le refus de livrer les biens à l'origine aurait constitué une atteinte aux biens meubles de la part de la personne de qui les biens ont été repris ou devaient l'être.

16. PRINCIPE GÉNÉRAL D'OPPOSABILITÉ DE LA DÉFENSE DE REPRISE DE POSSESSION DANS UNE ACTION EN DOMMAGES-INTÉRÊTS NOMINAUX POUR ATTEINTE À DES BIENS MEUBLES OU IMMEUBLES

La *Loi* proposée devrait prévoir, sous réserve de la recommandation 17, l'opposabilité dans une action en dommages-intérêts pour atteinte à des biens meubles ou immeubles apparentée à une action pour atteinte à la possession mobilière avec présomption de dommages, de la défense de reprise de possession fondée sur le fait que le refus de livrer les biens à l'origine aurait constitué une atteinte aux biens meubles de la part de la personne de qui les biens ont été repris ou devaient l'être.

17. INOPPOSABILITÉ DE LA DÉFENSE DE REPRISE DE POSSESSION DANS UNE ACTION EN DOMMAGES-INTÉRÊTS NOMINAUX POUR VIOLATION DE DOMICILE

La *Loi* proposée devrait prévoir l'inopposabilité du moyen de défense visé à la recommandation 16 lorsque l'atteinte aux biens s'est effectuée par une violation de domicile.

18. INOPPOSABILITÉ DE LA DÉFENSE DE REPRISE DE POSSESSION DANS UNE ACTION POUR ATTEINTE À LA PERSONNE

La *Loi* proposée devrait prévoir l'inopposabilité dans une action pour atteinte à la personne, de la défense de reprise de possession fondée sur le fait que le refus de livrer les biens meubles à l'origine aurait constitué une atteinte aux biens de la part de la personne de qui les biens ont été repris ou devaient l'être.

19. OPPOSABILITÉ DU DROIT DE DÉFENDRE LA JOUISSANCE PAISIBLE DE BIENS MEUBLES, SAUF A L'ÉGARD D'UNE PERSONNE AYANT DROIT AUX BIENS

La *Loi* proposée devrait prévoir que la personne ayant la jouissance paisible de biens meubles est fondée à recourir à la force raisonnable et nécessaire pour protéger sa jouissance paisible des biens, sauf contre une personne ou contre le mandataire d'une personne à qui la livraison des biens en cause ne peut être refusée sans que cela ne constitue une atteinte aux biens.

20. PRÉPONDÉRANCE DE LA LOI RELATIVEMENT À LA DÉFENSE DE REPRISE DE POSSESSION

La *Loi* proposée devrait prévoir que ses dispositions visant la reprise de possession (recommandations 15 à 19) ne sauraient être écartées par l'application d'une convention ou d'un accord exprès ou tacite intervenus entre les parties avant la survenance d'une tentative de prise de possession des biens meubles.

21. DÉDOMMAGEMENT D'UNE PERSONNE AYANT LA POSSESSION DE BIENS MEUBLES OU Y AYANT DROIT AU MÊME TITRE QUE LE PROPRIÉTAIRE

La *Loi* proposée devrait prévoir que, dans une action pour atteinte à des biens meubles, quiconque a la possession des biens en cause ou a droit à leur possession immédiate peut se faire dédommager comme si les biens lui appartenaient, sous réserve des conditions suivantes :

(a) sa réclamation peut être contestée par le titulaire d'un intérêt sur ces biens;

(b) sous réserve des Règles de procédure civile, la personne qui conteste la réclamation peut être constituée partie à l'action;

(c) la personne qui a la possession ou a droit à la possession immédiate de ces biens détient les sommes accordées par suite de l'action à titre de fiduciaire pour le compte de ceux qui possèdent un intérêt sur les biens.

Une disposition analogue devrait s'appliquer au titulaire d'un mandat écrit émanant d'une autre personne possédant un intérêt sur les biens. En plus de ces dispositions, la *Loi* proposée devrait prévoir que le seul moyen de redressement possible en cas d'atteinte à l'intérêt que possède une personne à l'égard de biens meubles est le recouvrement de dommages-intérêts.

22. ACTIONS FONDÉES SUR LE DROIT À LA POSSESSION IMMÉDIATE

La *Loi* proposée devrait prévoir que le droit à la possession immédiate de biens meubles peut ouvrir droit à une action pour atteinte à des biens meubles apparentée à l'action pour atteinte à la possession mobilière.

23. ACTIONS FONDÉES SUR L'APPROPRIATION ILLICITE OU SUR LA DÉTENTION ILLICITE

La *Loi* proposée devrait prévoir qu'un intérêt pouvant ouvrir droit à une action pour atteinte à des biens meubles apparentée à l'action pour

appropriation illicite, peut également ouvrir droit à une action pour atteinte à des biens meubles apparentée à l'action pour détention illicite et vice versa.

24. ACTIONS FONDÉES SUR UN INTÉRÊT RÉVERSIF

La *Loi* proposée devrait prévoir qu'un intérêt réversif peut ouvrir droit à une action pour atteinte à des biens meubles apparentée à l'action pour appropriation illicite.

25. ACTIONS FONDÉES SUR LA REMISE OU LA PRISE DE GAGES

La *Loi* proposée devrait prévoir qu'une atteinte à des biens meubles découlant de la remise ou de la prise en gage des biens meubles ouvre droit à une action pour atteinte à des biens meubles apparentée à l'action pour appropriation illicite.

26. ACTION INTENTÉE PAR UN COPROPRIÉTAIRE

La *Loi* proposée devrait prévoir que le copropriétaire de biens meubles a qualité pour intenter une action pour atteinte à des biens meubles, si l'atteinte en cause lui aurait permis en tant que propriétaire unique d'intenter cette action.

27. DÉLAI DE PRESCRIPTION DE DEUX ANS DANS LE CAS D'ATTEINTES DE BONNE FOI

Dans le cas d'une action pour atteinte à des biens meubles intentée par une personne n'ayant pas la possession des biens meubles contre les acheteurs de bonne foi à titre onéreux de ces biens, la législation provinciale pertinente devrait prévoir que l'action se prescrit par deux ans à compter de la date de la première des opérations mobilières concernant ultimement le défendeur et qui, n'eût été de la *Loi*, aurait constitué une appropriation illicite, ou par deux ans à compter de l'atteinte commise par le défendeur, selon le premier des évènements à survenir.

28. CALCUL DES DÉLAIS À PARTIR DE LA PREMIÈRE OPÉRATION MOBILIÈRE OU DE L'ATTEINTE COMMISE PAR LE DÉFENDEUR

Dans le cas d'une action pour atteinte à des biens meubles intentée par une personne n'ayant pas la possession des biens meubles, la législation pertinente en matière de prescription, devrait prévoir que, sous réserve de la recommandation 27, le délai approprié court à partir de la date de la première des opérations mobilières concernant ultimement le défendeur et

qui, n'eût été de la *Loi*, aurait constitué une appropriation illicite par voie d'aliénation à un acheteur de bonne foi à titre onéreux, ou que le délai court à partir de l'atteinte commise par le défendeur, selon le premier des évènements à survenir.

29. EXPIRATION DU DÉLAI ET TITRE

La législation en matière de prescription devrait prévoir que l'expiration du délai applicable à une action pour atteinte à des biens meubles qui, n'eût été de la *Loi*, aurait constitué une action pour appropriation illicite, y compris une action intentée par le titulaire d'un intérêt réversif, entraîne l'extinction du titre de quiconque, n'ayant pas la possession des biens meubles, possède néanmoins un droit d'action à l'égard de la personne même au profit de laquelle s'applique le délai de prescription.

30. NON-APPLICATION DES DÉLAIS DE PRESCRIPTION AUX VOLEURS ET AUX RECELEURS

La législation en matière de prescription devrait prévoir qu'un voleur ou un receleur ne peut bénéficier d'un délai de prescription quelconque en ce qui concerne les biens volés.

31. MODIFICATIONS À LA LOI SUR LA LOCATION IMMOBILIÈRE

La Partie IV de la *Loi sur la location immobilière*, L.R.O. 1980, c.232, devrait être modifiée de façon à permettre au juge de la Cour de district d'entendre une requête de la part d'un locataire visant la restitution de biens meubles ou le recouvrement de dommages-intérêts correspondants auprès d'un locateur ayant porté atteinte à la possession des biens du locataire.

32. MODIFICATIONS À L'ARTICLE 23 DE LA LOI SUR LA PROTECTION DU CONSOMMATEUR

La *Loi sur la protection du consommateur,* L.R.O. 1980, c. 87, article 23(1), devrait être modifiée de façon à énoncer clairement que la protection prévue à l'article 23(1) s'applique à une sûreté visée par la *Loi sur les sûretés mobilières, 1989,* S.O. 1989, c. 16, article 62(a).

33. QUESTIONS D'ACCESSION, DE CONFUSION ET DE SPÉCIFICATION

Il y aurait lieu d'effectuer des recherches plus poussées sur les conséquences, au niveau du titre sur des biens meubles, des opérations diverses entraînant l'annexation ou l'assimilation d'un bien à un autre, ou la

transformation d'un bien, opérations parfois intitulées respectivement accession, confusion ou spécification.

STUDY PAPER
on
WRONGFUL INTERFERENCE WITH GOODS

ONTARIO LAW REFORM COMMISSION

A Study Paper prepared for the
Ontario Law Reform Commission

by

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with the assistance of
David P. Paciocco

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The Ontario Law Reform Commission was established by the *Ontario Law Reform Commission Act* for the purpose of reforming the law, legal procedures, and legal institutions.

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PREFACE

This Study Paper examines the legal remedies available to those whose goods have been wrongfully interfered with. More specifically, it deals with, among other things, damage remedies, such as conversion, trespass, detinue and interference with a reversionary interest, and self-help remedies, such as recaption.

The Study Paper is, in part, an outgrowth of the Ontario Law Reform Commission's 1979 *Report on Sale of Goods*, in which some of the topics listed above were referred to, but in which no specific recommendations on such topics were made. In November, 1981, the Commission formally added to its program a project on wrongful interference with goods, with the authors of this Study Paper, Professor Ralph L. Simmonds, Faculty of Law, McGill University, and Professor George R. Stewart, Faculty of Law, University of Windsor, as joint Project Directors. However, in light of other pressing commitments and priorities, publication of a formal Commission report on the subject was deferred. Ultimately, in order to permit the early publication of the thorough research undertaken by Professors Stewart and Simmonds, the Commission decided to permit and facilitate the publication of this Study Paper under the names of the two Project Directors.

The aim of the Study Paper is twofold. First, it is to provide the courts, the legal profession, and other interested persons or groups with a resource document that will identify the many complexities, difficulties, and anomalies in the field of wrongful interference with goods. By alerting the Bench and Bar to these problems, and, in certain cases, by offering some possible solutions within the existing legal framework, it is hoped that the Study Paper will contribute in some measure to the rationalization of the law in this area. The second aim is more far-reaching, namely, to put forward a detailed set of recommendations for reform of the law to which the Attorney General may refer when comprehensive reform is contemplated.

This Study Paper was prepared for the Commission by Professor Simmonds and Professor Stewart. While the Commission did meet with the authors on many occasions, as indicated above these consultations did not give rise to formal published proposals for reform by the Commission. The Study Paper, therefore, including its legal analysis, conclusions, and recommendations, is exclusively the work of the authors. It does not represent the official views of the Ontario Law Reform Commission.

The Commission wishes to express its gratitude to Professor George Stewart and Professor Ralph Simmonds for their dedication and co-operation throughout the project, and to commend them on their fine scholarship. We also wish to thank those persons who authored various research

papers for the project, namely, Dean R. A. Macdonald, Faculty of Law, McGill University; Professor Peter P. Mercer, Faculty of Law, University of Western Ontario; Professor David M. Paciocco, Faculty of Law, Common Law Section, University of Ottawa; and Professor Kai Hildebrandt, Department of Political Science, University of Windsor. In addition, Professor John Evans, Osgoode Hall Law School, York University, consulted with Professors Simmonds and Stewart on the overlap between the project on wrongful interference with goods and the Commission's 1988 *Report on Contribution Among Wrongdoers and Contributory Negligence*. We thank Professor Evans, the Director of the contribution project, for his assistance.

Finally, we wish to express our appreciation to the Advisory Board established by the Commission for this project. The members of the Advisory Board gave generously of their time and energy to review the material presented to them by Professors Stewart and Simmonds and the research team, and to discuss the topic generally. The members of the Advisory Board were: Mr. Carne Bray, former President, Association of Canadian Financial Corporations, Toronto; Professor Michael G. Bridge, Faculty of Law, McGill University; former Deputy Sheriff Boris Kashuba, Judicial District of York; Mr. Miles D. O'Reilly, Q.C., Barrister and Solicitor, Toronto; Mr. David Phillips, Legal Advisor, Canadian Bankers Association, Toronto; Senior Master A. F. Rodger, Q.C., Supreme Court of Ontario; Mr. Marc Rosenstein, Advocate, Montreal; and the Honourable Carl Zalev, Judge of the County of Essex.

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CHAPTER 1

OVERVIEW OF PRESENT LAW AND THE INCIDENCE OF RELIEF

1. INTRODUCTION TO THIS STUDY PAPER

This Study Paper is concerned with the array of remedies our legal system offers to those with an interest in goods which has been wrongfully interfered with. It is not concerned with the acquisition or loss of title to or other interests in goods, although in the last chapter of this Study Paper we have something more to say about a part of such law. In the Ontario Law Reform Commission's 1979 *Report on Sale of Goods* the Commission discussed the matter of acquisition and loss of title at some length.[1]

However, this Study Paper had its origin in work done for the *Report on Sale of Goods*. In the course of its consideration there of the buyer's remedies by way of specific relief against the seller's breach, the Commission noted that both common law relief in an action in detinue, and relief in equity in an action for specific performance, or an order for specific restitution, proceeded along similar lines.[2] Recovery of the subject goods was generally not allowed where damages were an adequate remedy, and it did not matter for this purpose that the buyer had title. However, under Ontario's *Replevin Act*,[3] it seemed that the owner or other person capable of maintaining an action for damages was entitled, simply by following the prescribed procedure, to obtain an order for recovery of goods "wrongfully detained" or wrongfully taken. The Commission made no recommendations on the Act in the *Report on Sale of Goods* as it fell outside the terms of reference of that project. In fact the *Replevin Act* was subsequently repealed as part of the process of reform of the *Judicature Act* and the Rules of Practice in the province.[4] But it was the discussion in the *Report on Sale of Goods* that led the Commission to have us consider the area of remedies for wrongful interference with goods generally.

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[1] *Report on Sale of Goods* (1979), Volumes I & II, cc.11-13.

[2] Volume II, 439.

[3] R.S.O. 1980, c. 449. See also next note.

[4] See the *Courts of Justice Act, 1984*, S.O. 1984, c.11, s.210 (in force 1 January, 1985) (repealing *Replevin Act*).

The possibilities for inquiry had already been shown by the work of the English Law Reform Committee in its *Eighteenth Report (Conversion and Detinue)*, published in 1971.[5] The Committee had been asked to consider whether changes should be made to the "property torts" of detinue, conversion and trespass to goods,[6] and to the law of recaption of chattels, which covers defences to liability arising out of the extra-judicial recovery of goods. It proposed the creation of a new tort of wrongful interference with goods, to replace the torts of conversion, detinue and trespass to goods. The new tort was to retain the incidents of the old nominate torts, with some modifications to deal with anomalies in the present law which the Committee perceived. Aside from those modifications, the Committee made a number of incidental proposals, most notably for reform of the rules governing when a defendant in a property tort action could plead the title of a third party (the *jus tertii*), and some of the features of the law of recaption of chattels. The Committee proposed to carry forward with some comparatively modest changes the existing law as to recovery of the goods by judicial process, while extending the possibility for such relief to all wrongful interference actions. In 1977 Parliament passed the *Torts (Interference with Goods) Act 1977*,[7] which enacted some, but not all, of those proposals. No other common law jurisdiction has enacted similar legislation.

The study respecting wrongful interference with goods that the Commission asked us to conduct used the English experience as a reference point for the purpose of its examination of the law in Ontario. That examination involved the preparation of five research papers for the Commission, to which reference is made later in this chapter. One of these papers was based on a detailed survey of court records in Ontario, and on requests for information and advice sent to county bar associations, judges, sheriffs, business groups and the Consumers Association of Canada. The study reviewed the law in common law Canada and the United States, as well as the civil law in Quebec.

This Study Paper contains our analysis and recommendations for reform of the law concerning remedies for wrongful interference with goods. We have prepared a Draft Bill to give legislative form to our recommendations.[8] This Bill was prepared for the convenience of our readers more than as a ready-to-introduce piece of legislation, and would require much further refinement even were our recommendations to commend themselves entirely.

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[5] Cmnd. 4774 (1971).

[6] There is a fourth "property tort", injury to a reversionary interest, which the Committee also dealt with in ways we consider in this Study Paper.

[7] 1977, c.32 (U.K.).

[8] The Draft Bill for a *Remedies for Wrongful Interference with Goods Act* is annexed to this Study Paper as Appendix I.

Our recommendations, were they to be accepted, would work some considerable changes in current law, going beyond the only similar reform effort in the common law world, that in the United Kingdom already mentioned. As current law itself is probably little understood,[9] our Study Paper proceeds, following this chapter's introductory survey of present law and its use in practice, by outlining in some detail the contents of the major divisions of current law and practice that this chapter will identify, as well as presenting our recommendations for those major divisions.

2. AN INTRODUCTION TO THE PRESENT LAW

The elements of the common law remedial system are three. The centre-piece of the system is the range of causes of action in damages, or at least for monetary relief, for wrongful interference. Here are the four "property torts", being trespass to goods, conversion, detinue, and the action for injury to a reversionary interest. Other causes of action can be found also, most notably negligence, and actions for restitutionary relief, such as for money had and received to the plaintiff's use.

Traditional analysis, as exemplified by the *Eighteenth Report*, gives emphasis to the four property torts. They are considered the paradigm remedies for wrongful interference with goods. They are called property torts because they perform the role of vindicating real rights in personal property. There are at least two major hallmarks of this. The remedies are available whether or not there was a contractual or other consensual relationship between the parties. In addition, the belief of the defendant, held in good faith and based on reasonable grounds, that he had the right to do what he did is, generally speaking, irrelevant.

The second element of the common law remedial system is the range of actions for specific relief. This relief is of two major types. First, the claimant may get an order for recovery of the goods. The person to whom the order is directed must give the goods up to the claimant, or face contempt of court proceedings, as where the claimant obtains a mandatory injunction or an order for specific performance. Or the claimant may obtain an order, directed to a public official, for him to recover the goods. This would include an order appointing an interim receiver and a replevin order, under the recently repealed *Replevin Act*.[10]

The second major type of specific relief is directed at preserving or protecting the goods. Here, for example, the claimant may get an order to prevent the destruction of the goods or their removal from the jurisdiction

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[9] As the empirical work for this study seemed to show. We also note that much of the law here appears now to be little taught in common law faculties of law, falling as it does between the law of torts and the law of property.

[10] R.S.O. 1980, c.449, repealed by *Courts of Justice Act, 1984*, S.O. 1984, c.11, s.210 (in force 1 January 1985).

pending resolution of an issue between the parties. The relief is interlocutory: an example is an order under Rule of Civil Procedure 45.01.[11] Or the claimant may get an order for the cessation of an activity which interferes with the enjoyment of the goods but which does not amount to a wrongful detention.

The range of remedies for specific relief permits a claimant to vindicate his interest in goods which have been wrongfully interfered with. In addition, damages can be awarded in such actions as incidental or substitute relief. Further complicating the distinction between the two classes—damages and specific relief—is the fact that relief in detinue can, exceptionally, be an order for return of the goods to the plaintiff. Indeed, the usual detinue order is for return of the goods, or payment of a sum representing their value at the end of the trial, albeit at the defendant's option.

The third element of relief at common law, known as recaption,[12] is distinct conceptually from the first two categories of relief. First, although it is common to refer to the "remedy" of recaption, recaption authority provides a series of defences to various tort actions[13] rather than positive assistance in obtaining relief.[14] For example, "recaption" can operate as a defence to the tort of trespass to land. Second, whereas the first two categories of relief comprise remedies used in association with more or less formal determinations of rights, recaption involves the informal assessment of their rights by recaptors themselves, followed by the self-help vindication of those rights by the taking or retaking of the subject goods.

Recaption therefore provides a form of specific relief. The research paper on the frequency with which the various forms of relief are employed suggests that self-help may be the most heavily used of the various remedies. Notwithstanding that, its use has not caused much litigation. From this

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[11] Rule 45.01:

> (1) The court may make an interim order for the custody or preservation of any property in question in a proceeding or relevant to an issue in a proceeding, and for that purpose may authorize entry on or into any property in the possession of a party or of a person not a party.
>
> (2) Where the property is of a perishable nature or likely to deteriorate or for any other reason ought to be sold, the court may order its sale in such manner and on such terms as are just.

[12] "Recaption" is also described as "recapture", "justification", "retaking", occasionally as "reprisal", and in the context of security agreements, as "repossession".

[13] Statutory provisions provide defences to "recaptors" for certain actions that would otherwise constitute criminal or quasi-criminal offences: see ch. 8 of this Study Paper.

[14] See, for example, *Blackstone's Commentaries* (1803), Volume III, Sir George Tucket, ed. (1969), Chapter 1, at 4, para. II. "Remedy" connotes a legally endorsed method of obtaining redress and, although "recaption" operates as a series of defences, it is nonetheless a legally endorsed method of obtaining redress.

perspective, at least, recaption must be judged to be the most effective remedy afforded to those against whom property torts have been committed.[15]

3. THE EMPIRICAL SURVEY: THE INCIDENCE OF RELIEF

Here, basing ourselves on the Empirical Survey,[16] we elaborate on the matters raised in the last paragraph. The Survey methodology employed was an examination and analysis of court files from Essex County and the Judicial District of York, surveys or requests for information addressed to a number of persons and organizations, and a survey of sheriffs on replevin.

The analysis of court files shows that wrongful interference actions under the four nominate property torts (thus excluding negligence ones) are likely a very low proportion of total civil actions initiated in Ontario's District Court and in the Supreme Court. The proportion appears to be about 1.66% of the total, or for 1981/82 about 1,500 of about 90,000 cases.[17] The most frequently claimed remedy in the wrongful interference files analyzed was recovery of the goods *in specie* (non-replevin) (54% of the total), followed by damages claims (43%), claims for value (40%), replevin (21%), accounting and declaration (8% each), interlocutory injunction (4%) and specific performance (less than 1%).[18] The totals are well in excess of 100% because more than one remedy was claimed in slightly less than one-half of all actions. The survey was not designed, however, to throw up proceedings implicating recaption law, where the nature of the defence rather than the claim would be in issue.

An insight into the importance of self-help was obtained in the survey of financial corporations and banks.[19] Here, representatives of these institutions indicated that where a remedy must be resorted to the institutions overwhelmingly utilise self-help rather than any other form of remedy. If resistance is met, these institutions tend to resort to actions on their contracts with the debtor for the (accelerated) balance due. Damages remedies are rarely sought. Self-help is in fact considered by these institutions to be very effective and cheap relief. Indeed, representatives of financial corporations commented that they had little or no trouble with criminal

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[15] In the context of security agreement breaches J. Walker and H. Ash, *Debtor-Creditor Relations: Cases and Materials* (1978) at 16-71 agree. They conclude that recaption is "the most effective remedy afforded the secured party."

[16] Ontario Law Reform Commission, Research Paper V, *Incidence and Patterns of Preference*, K. Hildebrandt and P. Mercer (1983).

[17] *Ibid.*, 12, 22, 24.

[18] *Ibid.*, 33.

[19] See *ibid.*, 49-54. There were however more substantial responses from financial corporations that were members of the Association of Canadian Financial Corporations than from any other group of institutions.

or civil proceedings arising out of repossession. We do not, however, have total self-help figures. But the one figure we do have is suggestive—Ford Credit told us that, in 1981, 336 vehicles were recovered from retail buyers in Ontario (out of total retail contracts outstanding with Ford Credit for that year of 23,731).[20]

Other findings of the Survey are returned to in later parts of this Study Paper. In the following parts of this Study Paper, we focus on each of the major divisions of the current law we have identified, examining the major contents of that division, beginning with damages remedies. For each such major division, we make a number of relatively minor proposals for reform as the relevant part of the division is discussed. We separately consider a number of matters which carry the prospect for much more radical reform of present law, beginning with the question whether the recaption remedy should be abolished or severely restricted.

4. THE RESEARCH PAPERS AND THIS STUDY PAPER

This Study Paper is the result of the series of five research papers already referred to, as well as discussions among the authors of those papers (who include ourselves) and outside advisors. The research papers were on damages relief,[21] specific relief,[22] recaption,[23] incidence and patterns of preference,[24] and the remedies available under the civil law of Quebec.[25] A number of these papers made specific recommendations for reform some of which, in a modified form, are included in this Study Paper. We benefited from the various discussions referred to and from the analysis and recommendations of our outside advisors.[26]

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[20] *Ibid.*, 58 n.11.

[21] Ontario Law Reform Commission, Research Paper III, *Damages Remedies*, R.L. Simmonds (1983).

[22] Ontario Law Reform Commission, Research Paper I, *Remedies for the Recovery of Goods in Specie*, G.R. Stewart (1983).

[23] Ontario Law Reform Commission, Research Paper II, *Self-Help Remedies: Recaption of Chattels; Contractual Rights*, David M. Paciocco (1982).

[24] See note 16, *supra*.

[25] Ontario Law Reform Commission, Research Paper IV, *Remedies for Wrongful Interference with Corporeal Moveables in Quebec*, R.A. Macdonald (1983).

[26] They were at the time Carne Bray, President, Association of Canadian Financial Corporations, Toronto; M.G. Bridge, Professor of Law, McGill University, Montreal; Boris Kashuba, Deputy Sheriff, Judicial District of York; Miles D. O'Reilly, Q.C., Weir & Foulds, Toronto; David E. Phillips, Legal Advisor, Canadian Bankers Association, Toronto; A.F. Rodger, Senior Master, Supreme Court of Ontario, Toronto; Me Marc Rosenstein, Lapointe Rosenstein, Montreal; His Honour Judge Carl Zalev, Windsor.

In the finalization of this Study Paper, we particularly benefited from the assistance generously provided to us by Professor David P. Paciocco of the Faculty of Law, University of Ottawa. Professor Paciocco is the author of the research paper on recaption. At our request, he helped with the chapters of this Study Paper on that subject, and he prepared an opinion for us on the conformity of our proposals concerning recaption with the *Canadian Charter of Rights and Freedoms*.[27] That opinion is included as Appendix II to this Study Paper. In light of the nature of the assistance with which he provided us, we have included a reference to it in the title page to this work.

However, we would emphasize that this Study Paper is the final responsibility of the two of us as its authors.

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[27] *Constitution Act, 1982*, Part I, as enacted by the *Canada Act, 1982*, 1982, c. 11 (U.K.).

CHAPTER 2

DAMAGES RELIEF FOR WRONGFUL INTERFERENCE: THE CAUSE OF ACTION OF TRESPASS TO GOODS

1. INTRODUCTION TO THE RANGE OF CAUSES OF ACTION

Looking at the common law today, there are causes of action corresponding to four different types of wrongful *intentional*[1] interference with goods.[2] Taking the example of an automobile, there is the complaint, "I had an interest in that car, which you dented": here trespass to goods is the appropriate proceeding. There is the complaint, "I had an interest in that car, an interest which you denied my right to in a serious way": here conversion is the appropriate remedy. There is the complaint, "I have an interest in that car, which you won't return": here the remedy is detinue. Finally, there is the complaint, "I had an interest in that car, which you seriously damaged": here the remedy is for injury to a reversionary interest. There is obvious overlap between these classes of complaint; and it needs to be specified what "interest" is protected in each case, apart from anything else. What should be noted at this point is that trespass, conversion, detinue, and injury to a reversionary interest are simply shorthand ways of describing "a particular category of factual situation which entitles one person to obtain from the court a remedy against another person".[3] Trespass, conversion, detinue, and injury to a reversionary interest, as terms, derive from the time of the forms of action in English common law. Since the abolition of the forms of action, their remaining utility is simply their descriptive convenience.

Later in this Study Paper we recommend the supersession of these discrete torts by a cause of action for wrongful interference with goods which

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[1] Negligent interference with goods is usually discussed separately when the common law of wrongful interference is considered: we will deal with negligent interference when it becomes relevant to the better appreciation of the other causes of action.

[2] This analysis is adapted from G. Samuel, "Wrongful Interference with Goods" (1982) 31 I.C.L.Q. 357, at 384.

[3] *Letang* v. *Cooper*, [1965] 1 Q.B. 232 (C.A.), at 243, *per* Diplock L.J., quoted in D. Bentley, "A New-Found Haliday: the Eighteenth Report of the Law Reform Committee (Conversion and Detinue)" (1972) 35 Mod. L. Rev. 171, at 172.

would also cover *negligent* interference with goods as well as other cognate causes of action. Our new cause of action will continue much but not all of the present law. In the following chapters, beginning with this one on trespass to goods, we set out present law. Later we deal with what we believe to be needed changes, as well as the form of the new cause of action we recommend.

2. A GENERAL INTRODUCTION TO THE ELEMENTS OF TRESPASS TO GOODS

Trespass to goods is, along with detinue, probably the most venerable of the property torts. It can be shortly defined as any direct interference with the plaintiff's actual possession of a chattel.[4] This appears to be all the plaintiff has to prove, subject to the question whether he must also show actual damage of some kind. We return to that question shortly. It seems clear that the plaintiff does not have to show that the interference came about because the defendant intended it or was careless.[5] It is for the defendant to show, if he can, an unintentional interference not resulting from carelessness. But it is no defence for the defendant to show that he reasonably believed he was entitled to do what he did: a mistake of law, no matter how reasonable, is no excuse.[6]

It is clear that even for a property tort, there are few trespass to goods cases litigated. It has been suggested that the reason for this is the broad scope of the more modern tort of conversion.[7] While that may be the reason, trespass covers forms of interference with goods which would not be sufficiently serious for conversion. Just how slight the interference may be is not clear, however. To review this issue, we now touch in somewhat more detail on the major features of trespass.

3. PLAINTIFF'S ACTUAL POSSESSION

In conversion, a plaintiff can base his suit on actual possession or a right to immediate possession. In trespass only actual possession will do.[8] This

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[4] See J.G. Fleming, *The Law of Torts*, 7th ed. (1987), at 47; *Bell Canada* v. *Bannermount Ltd.*, [1973] 2 O.R. 811 (C.A.) (damage to plaintiff's underground cable).

[5] *Bell Canada* v. *Bannermount Ltd.*, *supra*, note 4. The position seems to be otherwise in England: see Fleming, *ibid*, note 4, at 48 (trespass requires proof of intention by plaintiff; no tort now of negligent trespass). It also seems to be otherwise in the United States: see W.L. Prosser & W. Page Keeton *et al.*, *Prosser and Keeton on Torts*, 5th ed. (1984), at 86 (to same effect as Fleming).

[6] *384238 Ontario Ltd. et al.* v. *The Queen in Right of Canada* (1983), 8 D.L.R. (4th) 676 (Fed. C.A.), leave to appeal to S.C.C. refused, 8 D.L.R. (4th) 676n.; Fleming, *supra*, note 4, at 48.

[7] See R.M. Solomon, B.P. Feldthusen and S.J. Mills, *Cases and Materials on the Law of Torts*, 2nd ed. (1987), at 95-97.

[8] See Fleming, *supra*, note 4, at 48; F. Pollock & R. Wright, *Possession* (1888), at 145-46.

form of title for both torts does not require that the plaintiff show his possession was good against all the world.[9] The defendant can show he had a better right to possess than the plaintiff—but it is no defence to show that a third party had a better right to possess than the plaintiff, unless the defendant acted with the third party's authority.[10] That is, the defendant can plead his own right, but not the right of a third party, or the *jus tertii* (as it is called).

The rationale for not permitting the defendant in a trespass action to plead the *jus tertii* is said to be the avoidance of scrambles for possession of goods owned by a third party who is himself unlikely to intervene.[11] The example often given is lost goods in a finder's hands. Whether this rationale makes the rule in its present form necessary is returned to in the separate chapter of this Study Paper on the *jus tertii*.

The common law has said that actual possession includes certain forms of vicarious possession, through a delegate. Recognized forms of vicarious possession arrangement include master and servant, principal and agent, and bailor and bailee under a bailment at will.[12] The theory of the extensions is that there is possession by the delegate of the master, principal or bailor. Thus, there must be a trespass against the delegate's possession,[13] and, if the delegate parts with possession to another, that other cannot be sued in trespass.[14]

It is not clear whether actual possession in a thief will support a trespass action. While there is some authority that it will,[15] the better view, based on the notion that courts will not lend their aid to the effectuation of an illegal purpose,[16] seems to be that a thief's possession is not sufficient for the purpose.

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[9] Fleming, *supra*, note 4, at 49; *Mason* v. *Morgan* (1865) 24 U.C.Q.B. 328 (C.A.) (mare in plaintiff's field gored by defendant's bull; plaintiff bailee of mare).

[10] Fleming, *supra*, note 4, at 49. This is at least unless the plaintiff is relying on one of the extensions of possession, below: see N.E. Palmer, *Bailment* (1979), at 123-24.

[11] See *Webb* v. *Fox* (1797), 7 T.R. 391, at 397, 101 E.R. 1037, *per* Kenyon C.J.

[12] See Fleming, *supra*, note 4, at 48-9; for a more complete discussion, see *Winfield & Jolowicz on Tort*, 11th ed., by W.V.H. Rogers (1979), at 448. The servant, in the master/servant case, has been held not to have possession for the purpose of bringing an action himself: *Richard* v. *Nowlan* (1959), 19 D.L.R. (2d) 229 (N.B. App. Div.). But in the bailment situation, *both* bailee and bailor have possession for that purpose: Palmer, *supra*, note 10, at 121-22.

[13] Even if the delegate cannot sue on it: see previous note.

[14] See *Penfolds Wines Pty. Ltd.* v. *Elliott* (1946), 74 C.L.R. 204 (H.C. of Aust.).

[15] *Richard* v. *Nowlan* (1959), 19 D.L.R. (2d) 229 (N.B. App. Div.); and see M.G. Bridge, *Sale of Goods* (1988), at 336.

[16] See Prosser and Keeton, *supra*, note 5, at 103.

It is evident to us that this distinctive feature of trespass—that it is only available to one with actual possession, subject to the sorts of extensions we have just outlined—points to two bases for the action. One is that physical possession should be protected against all later comers, because the physical possessor is the one most likely otherwise to resort to violent retaliations against scramblers for the goods. This would be indicated by the concern in relation to this tort to identify the one person with the most intimate relation with the goods.

But the extensions of the notion of actual possession suggest to us that the action also has a vindicatory purpose, although this purpose is probably subordinate to the one concerned with avoidance of scrambles for possession.

The effect of the actual possession requirement may be seen in the following example. Suppose goods are stolen, and then resold by the thief. It seems clear that the thief, but not the resale buyer, is liable in trespass. But both would be liable in the tort of conversion, which as we will see is viewed as the pre-eminent form of vindication of title to personal property at common law.

But the sorts of distinctions which the extensions of actual possession for the purposes of trespass may require do not seem sensible. It is not easy to appreciate why an owner who leased out goods under a lease which has come to an end should be able to sue in trespass while an owner of lost goods cannot.[17] The distinction between actual possession as it is now understood and a right to immediate possession did not commend itself to the Law Reform Committee in its *Eighteenth Report*,[18] as it does not to us. The intimate relation of a person with his goods which trespass seeks to protect does not require actual possession in the strict sense, as present law itself recognizes. We would recommend that a right to immediate possession should be sufficient for a trespass action too. We would note that the rule of present law that trespass would only lie at the instance of the current possessor would necessarily change as a result. In our recommendations with respect to the *jus tertii* below, the problem of multiple claims in respect of the same trespass, and of defendants arguing that the actual possessor should not be able to sustain the action where there exists another person with the right to immediate possession (as in the found goods situation) are dealt with.

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[17] It is not absolutely clear, however, that current law does so distinguish: it would seem possible to treat the finder as bailee under a revocable bailment. See Palmer, *supra*, note 10, at 26-27.

[18] Cmnd. 4774 (1971), para. 128(5). We note that the *Rest. 2d Torts* (1965), sec.219 already goes this far for certain forms of trespass; sec.220 goes even further, for even more limited forms, for persons with rights to future possession.

4. THE TYPES OF INTERFERENCE WHICH ARE ACTIONABLE

There is no doubt that contact occasioning physical harm sufficient for an action in negligence will suffice for trespass.[19] However, it is equally clear that there is at least one significant difference between the torts: trespass does not require proof of fault; negligence does. Trespass may also have a broader remoteness of damage rule than negligence.[20] And trespass seems to be narrower than negligence in one respect: the interference must be "direct" for trespass to lie. This requirement appears to connote a closer temporal and physical connection between the defendant's acts and the interference than is necessary for negligence.[21]

It has been suggested in the United States, where the directness requirement seems to have disappeared, that the distinction it calls for is "artificial".[22] We do not agree. If the policy of the law is to discourage scrambles for possession, and generally is one of concern with intimate relations with goods, directness or some requirement like it would seem to have a role to play. We have concluded that there is no reason to do away with such a requirement.

This discussion of directness leads to a consideration of whether the plaintiff has to prove actual damage of the sort required in a negligence action. Is a mere temporary contact involving no physical harm to the chattels actionable? The position on the authorities is unclear. What Canadian authority there is suggests that no physical harm is necessary.[23] The position is otherwise in the United States, except that intentional dispossession, however brief, will ground a claim for damages.[24] There may be a distinction to be drawn between intentional contacts, for which there should be liability, and unintentional contacts, for which there should be none. There is some, but not much, Commonwealth authority for such a distinction.[25]

It seems to us that there is room in trespass for the courts to develop a notion of a dignitary interest in chattels, such as heirlooms, museum pieces,

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[19] In fact, "contact" is not strictly necessary in either tort: see, on trespass, Fleming, *supra*, note 4, at 47.

[20] See *Auger* v. *Cook* (1876), 39 U.C.Q.B. 537 (C.A.); and Fleming, *supra*, note 4, at 47 (intentional trespass to land).

[21] See Fleming, *supra*, note 4, at 47 (contrasting throwing poisoned baits to dogs with laying such baits for them).

[22] Prosser and Keeton, *supra*, note 5, at 85 (source of quotation).

[23] *Wolverine S.S. Co. v. Canadian Dredging Co.*, [1930] 4 D.L.R. 684, at 687 (Ont. S.C.) (if there was a taking or asportation); *Demers* v. *Desrosiers*, [1929] 3 D.L.R. 401 (Alta. S.C.).

[24] See Prosser and Keeton, *supra*, note 5, at 87.

[25] See Palmer, *supra*, note 10, at 119 n.13.

or family pets. In developing such a notion, the courts could take account both of the nature of the interference—duration; whether intentional or not; whether dispossessory or not—and the nature of chattel—such as whether it is closely associated with the plaintiff's person or household. We do not think it wrong for the law to develop such a notion more clearly than it has now.[26] At the very least we do not see any reason to preclude such a development. As in other areas where nominal damages may be a remedy, the court has ample means at its disposal, including denial of costs, to control abuse of its process.

5. DAMAGES FOR TRESPASS

Apart from the matter of nominal damages, the plaintiff's claim will be for his actual loss, including any diminution in value of the goods brought about by the interference representing the trespass. This latter element is not affected by the fact of a *tertius* or the plaintiff's limited interest in the goods, as where the plaintiff is a bailee. However, where he has a limited interest, and he is suing a trespasser with a continuing interest in the goods (as where the holder of a security interest seizes the goods before default), the plaintiff must give credit for the defendant's interest.[27]

Consequential loss is recoverable in proper cases, such as loss of income consequent on taking away of the plaintiff's goods.[28] In suitable circumstances exemplary damages may be awarded.[29]

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[26] Accord, *Salmond and Heuston on the Law of Torts*, 18th ed., by R.F.V. Heuston & R.S. Chambers (1981), at 90; and Palmer, *supra*, note 10, at 119 n.13; *contra*, Fleming, *supra*, note 4, at 48.

[27] See Fleming, *supra*, note 4, at 49; and *Brierly* v. *Kendall* (1852), 17 Q.B. 937. The exception may be even wider than that: see Palmer, *supra*, note 10, at 183-86; and *Terminal Warehouses Ltd.* v. *J.H. Lock and Sons Ltd.* (1958), 12 D.L.R. (2d) 12 (Ont. C.A.).

[28] See e.g. *Benson* v. *Connor* (1857), 6 U.C.C.P. 356 (C.A.).

[29] See e.g. *Chedrawe* v. *Chediac* (1980), 37 N.S.R. (2d) 285 (T.D.) (no exemplary damages because defendant already convicted of breaking and entering).

CHAPTER 3

DETINUE AND CONVERSION

1. INTRODUCTION

These two torts are the common law's principal means of vindicating title to personal property. Detinue is the older of the two. As we will see much—but not all—of its ground is now covered by the tort of conversion, which has come to dominate the older cause of action.

However, detinue, with its focus on goods withheld from the person entitled to them, and its provision for the return of those goods, is probably closer to the core idea of vindicating that entitlement than conversion. The latter covers a much wider array of dealings with goods. Conversion is also a damages remedy, where the primary measure of damage is the value of the goods themselves, and where the effect of the remedy is akin to a forced sale of the subject goods.

With that broad distinction between the two remedies in mind, we thus begin our analysis with detinue.

2. DETINUE

(a) The Elements of Detinue

As trespass is concerned with wrongful touching or taking, so detinue is concerned with wrongful withholding. The elements of the tort are that the plaintiff with a right to immediate possession is faced with a defendant who is wrongfully withholding. The detinue action in fact has a number of features which distinguish it from all of the other property torts. The usual order in successful detinue actions is that the defendant surrender up the goods or pay their value, at his option.[1] The other actions are all for damages, although in appropriate cases a plaintiff could ask for an alternative remedy of recovery *in specie* and ask a court which is also vested with jurisdiction in equity to order the defendant to return the goods without an

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[1] See N.E. Palmer, *Bailment* (1979), at 152; on the full array of remedies in detinue, see *Schentag* v. *Gauthier* (1972), 27 D.L.R. (3d) 710 (Sask. D.C.).

option.[2] In detinue, but not in the other actions, return of the goods is a good defence, except as to any damages for delay in the handing over.[3] And in detinue, the value of the goods is to be assessed as at the end of the trial, not, as in the others, at the date of the action constituting the relevant tort.[4] This last difference is blurred in the case of detinue and conversion by virtue of the possibility of conversion claims for any rise in value between the date of the conversion and date of judgment as consequential loss.[5] And in both detinue and conversion, there is a duty to mitigate or crystallize loss, so that rises in value occurring more than some reasonable time (within which to replace goods or bring suit) after the wrong ought to have been discovered are not to be taken into account.[6]

(b) Detinue, the Plaintiff's Right to Immediate Possession, and the Relief Available

The plaintiff in detinue must rely on a right to immediate possession. In conversion, as we will see, the plaintiff can rely either on a right to immediate possession or on actual possession. This difference is somewhat less than appears at first sight, because a plaintiff in detinue can rely on prior actual possession to make out a *prima facie* right to immediate possession.[7] This case can be met, however, by the defendant proving either that the (possessory) title was extinguished, because the plaintiff was lawfully divested of possession, or an identified *tertius* exists with a right superior to the plaintiff's.[8] Neither response would be sufficient against a conversion claim based on actual possession, as we will see.

Furthermore, it may be that the right to immediate possession required for detinue is different from the right to immediate possession sufficient for

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[2] See *Courts of Justice Act, 1984*, S.O. 1984, c.11, s.109 (in force 1 January 1985) and J.G. Fleming, *The Law of Torts*, 7th ed. (1987), at 67-68.

[3] See Fleming, *supra*, note 2, at 66.

[4] See Fleming, *supra*, note 2, at 63-64.

[5] *Ibid.*, 64; R.M. Solomon, B.P. Feldthusen and S.J. Mills, *Cases and Materials on the Law of Torts*, 2nd ed. (1987), at 106; and *Asamera Oil Corp. Ltd.* v. *Sea Oil & General Corp.*, [1979] 1 S.C.R. 633, at 652-653, 661-664; but see also *Steiman* v. *Steiman* (1982), 23 C.C.L.T. 182 (Man. C.A.), at 186-192 *per* O'Sullivan J.A., Hall J.A. concurring, leave to appeal to S.C.C. granted (but not heard, as the parties settled, coming to an agreement on the amount of damages).

[6] Fleming, *supra*, note 2, at 64. See also *Baud Corp., N.V.* v. *Brook* (1973), 40 D.L.R. (3d) 418 (Alta. App. Div.), varied on other grounds, but affirmed on this point, *sub nom. Asamera Oil Corp. Ltd.* v. *Sea Oil & General Corp.*, [1979] 1 S.C.R. 633, at 661-64.

[7] See *Buckley* v. *Gross* (1863), 3 B. & S. 566, 122 E.R. 213 (K.B.), discussed in P. Atiyah, "A Re-examination of the Jus Tertii in Conversion" (1955) 18 Mod. L. Rev. 97, at 104-105.

[8] See authorities in previous note. There is a dispute about the *jus tertii* defence here: see ch. 14, below.

conversion. This was the view of the Law Reform Committee in its *Eighteenth Report*, where it is said that:

> [i]n detinue, it seems clear that the plaintiff (if unable to rely on actual possession) must have not only an immediate right to possession but such a right arising out of a proprietary interest, absolute or special, whereas in conversion an immediate right to possession, however arising, is sufficient.[9]

The proprietary right required for detinue can, it seems, be an absolute interest in the goods, such as that of a purchaser under a contract for sale of goods where property has passed. Or the interest can be a limited one, such as that of at least some bailees[10] after they have gained possession. This last requirement assumes that detinue as a *common law* action could be said to require *legal* property;[11] and that requires an absolute interest or one based on possession.[12] We note that this does not prevent such persons as finders of lost property from suing, on the basis either that they are bailees of the true owner,[13] or on the basis that they have a right to possess based on prior actual possession.

The implications of the Committee's analysis can be seen in the context of a sale of goods. The requirement for an immediate right to possess to sustain detinue would, on its own, prevent a suit by a purchaser even where property has passed, provided that the seller has a lien on the goods.[14] The super-added requirement for a (legal) proprietary right would appear to prevent a suit in detinue by a purchaser where property has not passed, even though the purchaser has a contractual right to possession, and even though the goods were of a type which would make it likely that an order for specific performance would be made.[15]

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[9] Cmnd. 4774 (1971), para. 9 (footnote omitted). We note later that there are some authorities which suggest that conversion's ambit in this respect is in fact no wider than detinue's as the Committee stated it.

[10] See Palmer, *supra*, note 1, at 150, 65.

[11] The fusion of law and equity would not necessarily change this: see the traditional view of the fusion of law and equity, discussed in J.H. Baker, *An Introduction to English Legal History*, 2nd ed. (1979), at 98-99.

[12] On legal interests in personal property, see R.M. Goode, *Commercial Law* (1982), at 53 n.20, 55-56; on the extended meanings of possession in this context, see Palmer, *supra*, note 1, at 69 and *Morison* v. *Gray* (1824), 2 Bing. 260, 130 E.R. 305 (factor or agent to whom goods consigned has special property before goods come into his hands). It seems to us possible that the common law could develop so that an immediate right to possession itself might create a special property, at least in more situations than these: see below.

[13] See N.E. Palmer, "The Abolition of Detinue" [1981] Conv. 62, at 65 n.15; and Palmer, *supra*, note 1, at 70.

[14] *Clerk & Lindsell on Torts*, 14th ed., by general eds. A.L. Armitage & R.W.M. Dias (1975), para. 1117.

[15] Specific performance is an exceptional remedy in sale of goods cases: see M.G. Bridge, *Sale of Goods* (1988), at 732-37, and below. On the specific point in the text, see *ibid*., at 37 n.103.

The emphasis on a *proprietary* right to possession in detinue, if the plaintiff's claim is not founded on actual possession, might be because the action has a number of features that, as we have suggested earlier, bring it closer than the other torts to a vindication remedy. First, the commonest order in a successful detinue action is probably that the defendant surrender the goods or pay their value.[16] Further, return of the goods themselves is a good defence, except as to any damages for the delay in handing over.[17] And the value of the goods is to be assessed at the end of the trial.[18]

However, we believe that, after the tort of conversion is more closely examined as we do below, these differences are rather less important than they appear to be. Furthermore, we note that there are authorities which tend to suggest that an immediate right to possession however arising is, contrary to the Committee's view, sufficient for detinue.[19] However, there are authorities the other way.[20] We do not think that there should be this sort of distinction between the two types of remedy, and would recommend that any such be removed from the law.

(c) The Defendant's Wrongful Withholding

The gist of detinue as we saw is the unlawful withholding of possession. This normally entails a demand, although it has been held that prior demand is unnecessary if it can be shown it would have been futile.[21] Also, withholding would on the face of it entail that the defendant, at the time of the demand at least, have had control of the goods.[22] However, there is an exception in the case of bailees facing their bailors: the inability of the bailee

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[16] See Fleming, *supra*, note 2, at 67.

[17] Compare the position in conversion, below.

[18] Which appears to be the better view, although some authorities refer to the (possibly later) date of judgment: see *Asamera Oil Corp. Ltd.* v. *Sea Oil & General Corporation*, [1979] 1 S.C.R. 633, at 652-54.

[19] See *International Factors Ltd.* v. *Rodriguez*, [1979] 1 All E.R. 17 (C.A.), at 19 *per* Sir David Cairns (conversion action: dicta seemingly not limited thereto); and *Carter* v. *Long* (1896), 26 S.C.R. 430, at 435-36 (replevin action).

[20] See *Jarvis* v. *Williams*, [1955] 1 W.L.R. 71 (C.A.) (authority relied upon by Committee: action against agent of owner; owner had given plaintiff right to repossess); *Singh* v. *Ali*, [1960] A.C. 167, at 176 (P.C.) (dictum); *Hull* v. *Mancer*, [1944] 1 W.W.R. 114 (Man. C.A.) (replevin); and *Leigh & Sillivan Ltd.* v. *Aliakmon Shipping Co. Ltd.*, [1986] 2 W.L.R. 902 (H.L.) (buyer to whom risk but not legal title, possession or right to possession had passed could not sue shipper in negligence), which is discussed in ch. 4, below.

[21] *Baud Corp., N.V.* v. *Brook* (1973), 40 D.L.R. (3d) 418 (Alta. App. Div.), varied on other grounds *sub nom. Asamera Oil Corp. Ltd.* v. *Sea Oil & General Corp.*, *supra*, note 18. It seems likely this exception will be narrowly confined: see N. E. Palmer, Comment (1975), 53 Can. Bar Rev. 121.

[22] See *Clerk & Lindsell on Torts*, 14th ed., *supra*, note 14, paras. 1178 and 1179; compare the contrary view of Spence J. in *Aitken* v. *Gardiner*, [1956] O.R. 589 (H.C.), which is not well supported by the authorities he cites.

to return the goods because they have been lost is no answer to a detinue claim. This is unless the bailee can show that the loss occurred without his fault.[23]

In fact, a withholding in the face of a demand by a plaintiff with an immediate right to possession may also, as we note later, amount to conversion. This is because the gist of conversion is the defendant's denial of the plaintiff's title. A withholding of possession may be evidence of such a denial. But it need not be. An example is a withholding of goods for a finite period for such non-title related reasons as an industrial dispute which prevents the defendant making them available.[24] This is much more readily seen as grounds for a detinue claim than as grounds for a conversion one.[25] In any event, the mere loss of goods by a bailee is not grounds for a conversion claim.[26] There is thus a substantial overlap between conversion and detinue; there is also an appreciable difference between them.

(d) Should Detinue Be Abolished?

The Law Reform Committee was impressed by the degree of overlap between detinue and conversion, and proposed that detinue be abolished.[27] The *Torts (Interference with Goods) Act 1977* implemented this proposal.[28]

In our view, the Committee did not make a sufficient case for abolition. It may be that the proposals we make here concerning recovery *in specie* will tend to render detinue less important.[29] But there are types of withholding for which, as we have seen, detinue appears more readily viewed as the remedy than conversion. The abolition of detinue would create needless uncertainty about the availability of a remedy for such situations.[30] It might be suggested that a better approach would be to create a new cause of action which would avoid the detinue/conversion overlap as well as other ones that appear in this chapter. We consider such an approach in chapter 5, below.

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[23] See Palmer, *supra*, note 1, at 150-51.

[24] This was the situation in *Howard E. Perry Ltd.* v. *British Railways Board*, [1980] 2 All E.R. 579 (Ch.D.).

[25] See Palmer, "The Abolition of Detinue", *supra*, note 13, at 63, 66-68; and G. Samuel, "Wrongful Interference with Goods" (1982) 31 I.C.L.Q. 357, at 378-82.

[26] Cmnd. 4774 (1971), para. 8.

[27] *Ibid.*, paras. 7-15.

[28] See s.2, which as the Committee also recommended broadens conversion to cover the case of bailees unable to produce the goods bailed, as to which see text at note 23, *supra*.

[29] The Committee noted that in the *United States* the remedy had largely become obsolete, having been supplanted by statutory remedies for the recovery of goods or by replevin: Cmnd. 4774 (1971), para. 7; and see *1 Am. Jur. 2d* (1962), Actions, sec.21, and *66 Am. Jur. 2d* (1973), Replevin, secs. 160-170 (incidents of detinue).

[30] Under the English *Act*, the scope of conversion appears to be widening to cover this situation: see *Howard E. Perry Ltd.* v. *British Railways Board*, *supra*, note 24.

3. CONVERSION

(a) The Evolution of Conversion

Conversion is the property tort of broadest application. It originally emerged in the late fifteenth century in England, as the action of trover, to fill gaps left by detinue.[31] It has come to cover much of the ground otherwise covered by detinue and trespass to goods.[32] Its coverage is so broad indeed that Prosser saw the tort as almost defying definition.[33] However, a very serviceable definition is Salmond's, which contains two elements:

> (1) a dealing with the chattel in a manner inconsistent with the right of the person entitled to it, and
>
> (2) an intention in so doing to deny that person's right or to assert a right which is in fact inconsistent with such right.[34]

The right of the plaintiff in question must be actual possession or a right to immediate possession.

Serviceable as Salmond's definition is, there is at least one problem with it, namely, its requirement for the defendant to "deal" with the goods, which we return to below. A number of writers have suggested that the best guide to the operation of the tort is its usual measure of damages, which is the value of the chattel at the date of the conversion. These writers suggest that the interference of the defendant must be sufficiently serious to warrant the plaintiff saying to him, "you have bought yourself something."[35] How broadly—and sometimes how narrowly—that warrant has been interpreted is best appreciated by considering the major ways in which conversion can be committed.

(b) Conversion by Participation in a Disposition of the Goods or an Interest in Them

The authorities establish that parting with or receiving possession in an unauthorized transaction which the defendant knows involves a property interest in the goods is a conversion. Thus, in the simplest case, a seller of

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[31] Fleming, *supra*, note 2, at 50.

[32] *Ibid.*

[33] W.L. Prosser, *Handbook of the Law of Torts*, 4th ed. (1971), at 79; and see W. L. Prosser & W. Page Keeton *et al.*, *Prosser and Keeton on Torts*, 5th ed. (1984), at 88 (same).

[34] *Salmond on Torts*, 15th ed., R.F.V. Heuston ed. (1969), at 125, quoted in Cmnd. 4774 (1971), para. 38. To a similar effect e.g. *Ashfield* v. *Edgell* (1892), 21 O.R. 195 (C.P.), at 202, *per* Rose J.

[35] Fleming, *supra*, note 2, at 49 (source of quotation); and see e.g. *Rest. 2d. Torts* (1965), sec. 222A. The *Eighteenth Report*, Cmnd. 4774 (1971), para. 96 contains an endorse-

stolen goods who delivers them to the purchaser is a converter; so for that matter is the buyer.[36] The thief is also a converter, by taking, which is returned to below.

In line with the authorities on dealings by way of sale and purchase of stolen goods, it has been held that a person who entrusts such goods to another, such as a repairman, in circumstances where a lien would otherwise be created on the goods, is a converter.[37] But it has also been held, in an English case, that receipt of goods in pledge is not a conversion.[38] This latter view seems to be wrong, in light of the intention of the pledgor and the pledgee to deal with a property interest in the goods, and in light of the lien authority. The Law Reform Committee recommended a statutory overruling of the pledge authority,[39] and the *Torts (Interference with Goods) Act 1977* provides that receipt of goods by way of pledge is conversion if the delivery is conversion.[40] We agree with the principle, but we would state it in terms that the delivery and receipt of goods should be sufficient interference for the purpose of conversion. This latter seems to us to better express the underlying principle.

In one situation participation in a wrongful dealing with a property interest in the goods will not attract liability. This is where the defendant is a disponee in a transaction in which the plaintiff's interest is extinguished against his will. This is the area of the exceptions to the common law's principle of *nemo dat quod non habet*—no one can give what he does not have. We will not attempt here to detail either the principle or its exceptions. The Ontario Law Reform Commission's 1979 *Report on Sale of Goods* dealt with both, recommending retention of the principle with some changes and additions to the exceptions.[41] We will, however, return in chapter 13 below to one of the recommended additions, a new exception based on the carelessness of the true owner.

The authorities are not altogether clear on when a person who assists in, but is not a party to, a wrongful dealing with a property interest in goods will

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ment of the present law, that satisfaction of the money judgment extinguishes the plaintiff's title. We see no need to restate any such rule: the *Torts (Interference with Goods) Act 1977* does not.

[36] See e.g. *Hendricks* v. *Titus* (1870), 13 N.B.R. 77 (S.C.) and *Gibson* v. *McKean* (1876), 16 N.B.R. 299 (S.C.). Compare *Waterloo Manufacturing Co.* v. *Woeppell*, [1928] 2 D.L.R. 494 (Sask. C.A.) (buyer acquired goods on trial; returned them; not conversion).

[37] *Clerk & Lindsell on Torts*, 15th ed., by general ed. R.W.M. Dias (1982), para. 21-18.

[38] *Spackman* v. *Foster* (1883), 11 Q.B.D. 99. No Canadian case to a similar effect or discussing this case could be traced. U.S. law appears to be to a contrary effect: see Prossor & Keeton, *supra*, note 33, at 94.

[39] Cmnd. 4774 (1971), para. 43; and see *Rest. 2d Torts* (1965), sec. 233.

[40] S.11(2).

[41] See Vol. II, ch.12.

be liable in conversion. At one extreme, it is clear that mere "ministerial" dealings will not attract liability. By such dealings is meant handling by someone for another in ignorance of that other's lack of title and of the fact (if it is the fact) that a dealing with a property interest is involved. Thus, merely picking up, packing, storing, transporting, forwarding or delivering goods in such circumstances will not attract liability.[42] At the other extreme, it is clear that handling goods pursuant to a disposition which the handler negotiated will attract liability. The example would be an auctioneer selling stolen goods.[43] What is not clear is the liability of the handler acting under a transaction, involving a property interest, of whose general terms he was aware, but which he did not help to set up.[44] The English Court of Appeal in *National Mercantile Bank* v. *Rymill*[45] held that an auctioneer who delivered goods to a purchaser under a transaction arranged by the auctioneer's customer and not the auctioneer, was not liable. However, there are inconsistent earlier authorities,[46] and the Canadian case law is thin.[47]

The Law Reform Committee dealt with the area of unclarity in the law at some length. They concluded that the law should, generally speaking, be left as it is.[48] That is our view also. One of the hallmarks of conversion appears to be its responsiveness to variations in the facts, and like the Committee we think that it is probably responding to appropriate variations in this area. Thus, in *Rymill* it is of interest to note that the defendant's action did not have the immediate effect of making the goods much harder to trace. Liability might have been appropriate had the defendant also arranged for the export of the goods.[49]

(c) Conversion by Use, Taking, Destruction or Transformation

Closely related to participation in transactions with goods is beneficial enjoyment of goods whose possession the plaintiff lost, but not at the hands

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[42] *Clerk & Lindsell on Torts*, 14th ed., *supra*, note 14, para. 1137; *Gauhan* v. *St. Lawrence and Ottawa Railway Company* (1878), 3 O.A.R. 392, at 395-396, *per* Morrison J.A., Moss C.J.A., Burton and Patterson JJ.A. concurring.

[43] *Johnston* v. *Henderson* (1896), 28 O.R. 25.

[44] See the discussion in Cmnd. 4774 (1971), paras. 46, 47.

[45] (1881), 44 L.T. 767, dist'd in *Johnston* v. *Henderson*, *supra*, note 43, at 28, and approved in *Mackenzie* v. *Blindman Valley Co-operative Association Limited*, [1947] 4 D.L.R. 687 (Alta. S.C.), at 699.

[46] See notably *Hollins* v. *Fowler* (1875), L.R. 7 H.L. 757, at 766-767, *per* Blackburn J., which was apparently approved in *Mackenzie* v. *Blindman Valley Co-operative Association Limited*, *supra*, note 45.

[47] The only reported cases to consider *Rymill* are cited in note 45, *supra*.

[48] Cmnd. 4774 (1971), paras. 41, 46-50 (proposing a codification). We note that the *Torts (Interference with Goods) Act 1977* has no provision on the subject.

[49] Compare *Stephens* v. *Elwall* (1815), 4 M. & S. 259, 105 E.R. 830, discussed in Cmnd. 4774 (1971), para. 41 n.4.

of the defendant. The older authorities suggest that such enjoyment attracts liability; but more modern ones are more discriminating.[50] Account must now be taken of the purpose and duration of the use, including the risk of damage to which the goods are exposed. Professor Fleming contrasts the use of the plaintiff's milk bottles by the milkman's customers, who accept their milk in those bottles and return them, with the use of those bottles by the milkman himself. His customers would not be converters; but the milkman would be one.[51]

Where the defendant who beneficially enjoyed the goods had taken them from the plaintiff without permission, the defendant is a converter. The taking of a car for a joy-ride is often instanced.[52] But a taking is not itself sufficient. The purpose of the taking, and the extent and duration of the interference that results, must be examined. The classic case involved a ferryman who in a dispute with the plaintiff put his horses ashore. The ferryman was a trespasser to the horses, but not a converter of them.[53]

Where the defendant destroys the goods in the course of an unauthorized use, even one which would not otherwise attract conversion liability, he is a converter.[54] Transformation of the goods in a process of manufacture is akin to destruction for this purpose: the identity of the goods has been lost, and there is liability in conversion.[55] There is a damages issue which such beneficial destruction raises, and it is returned to below.

(d) Conversion by Withholding Possession

We have already mentioned that withholding possession is evidence from which conversion may be inferred. At least this is the case where there is an unconditional refusal to relinquish possession in the face of an unqualified and specific demand.[56] However, as we also indicated, the inference of conversion may not be drawn where detinue nonetheless may be made out. And neither conversion nor detinue is made out where the defendant simply withholds possession so that he can inquire into the claimant's rights.[57]

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[50] Fleming, *supra*, note 2, at 57.

[51] *Ibid.*

[52] See Fleming, *supra*, note 2, at 51-52.

[53] See *Fouldes* v. *Willoughby* (1841), 8 M. & W. 540, 151 E.R. 1153, and Fleming, *supra*, note 2, at 52.

[54] *Fouldes* v. *Willoughby*, *supra*, note 53, at 1156-57 (E.R.), and Palmer, *supra*, note 1, at 129; but see *Bushel* v. *Miller* (1718), 1 Stra. 128, 93 E.R. 428 (K.B.).

[55] See *Clerk & Lindsell on Torts*, 15th ed., *supra*, note 37, para. 21-32. See also *Katzman* v. *Mannie* (1919), 46 O.L.R. 121, aff'd 48 O.L.R. 551 (C.A.); compare *Stimson* v. *Block* (1885), 11 O.R. 96.

[56] See *Clerk & Lindsell on Torts*, 14th ed., *supra*, note 14, paras. 1094, 1095.

[57] Fleming, *supra*, note 2, at 53.

(e) Conversion Where There is No Handling of the Goods

The instances discussed so far have all involved defendants who handled the goods. But physical contact of that sort or any sort is not necessary for conversion. One class of cases involves goods left on land which the defendant controls. In an old case,[58] the plaintiff sent men to remove a barn, but the defendant met the men and ordered them off. The defendant was held to be a converter. This can be contrasted with another English case[59] where the plaintiff held a bill of sale over furniture which was in a house in respect of which the defendant landlord claimed unpaid rent. The defendant, so that he might later exercise his right of distress, told the plaintiff he would not be permitted to remove the goods, and a man was stationed there to prevent this. The plaintiff in fact made no attempt to remove the goods. It was held by a majority of the Court of Exchequer that there had been no conversion.[60]

But the defendant need not even have exercised control over the goods. One class of situation involves extinction of the plaintiff's claim through a *nemo dat* exception which does not involve a delivery of possession. There appears to be one such exception, for a disposition by a person who acquired goods under a purchase voidable by his seller at the date of the resale.[61] A related situation was involved in an English case[62] where persons who had taken trucks on hire-purchase terms sold them to the defendants who resold them. Subsequently, the licences attaching to the trucks were lost, apparently as a result of the defendants' actions, and the trucks were sold back to the defendants. Throughout, the trucks remained in the original hirer's possession. The defendants were held liable in conversion, because of the dealing which led to loss of the licences.

(f) Must There be a "Dealing" in the Goods?

The writers on conversion stress that some "dealing" with the goods is required, whereby the defendant changes the plaintiff's interest in them, or the defendant exercises some physical control over them, even if of an attenuated sort.[63] The Law Reform Committee thought it appropriate to

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[58] *Wansbrough* v. *Maton* (1836), 4 Ad. & E. 884, 111 E.R. 1016.

[59] *England* v. *Cowley* (1873), L.R. 8 Ex. 126.

[60] See also *Smalley* v. *Gallagher* (1876), 26 U.C.C.P. 531 (C.A.).

[61] *Sale of Goods Act*, R.S.O. 1980, c.462, s.24; contrast the Ontario Law Reform Commission's *Report on Sale of Goods* (1979), Vol. III, Draft Act, s.6.5 (buyer must take delivery). Otherwise, a mere bargain and sale without delivery is not conversion: Cmnd. 4774 (1971), para. 45.

[62] *Douglas Valley Finance Co. Ltd.* v. *S. Hughes (Hirers) Ltd.*, [1969] 1 Q.B. 738.

[63] See e.g. Fleming, *supra*, note 2, at 58; *Clerk & Lindsell on Torts*, 15th ed., *supra*, note 37, paras. 21-33; and see *Dickey* v. *McCaul* (1887), 14 O.A.R. 166. But see also *Federal Savings Credit Union Ltd.* v. *Centennial Trailer Sales Ltd.* (1973), 37 D.L.R. (3d) 146 (N.S. S.C. T.D.), at 154.

recommend that such an element be required for the tort. They were concerned with *dicta* that state that mere denials of the plaintiff's title may amount to a conversion, *dicta* which the *Torts (Interference with Goods) Act 1977* now repudiates.[64]

In our examination of the case law we considered whether there was any reason to legislate a "dealing" element. We approached the matter this way, because, as we have tried to show, the hallmark of conversion is its flexibility, which is constrained by its measure of damages, based as that measure is on a forced sale. In the event we concluded that there was no need to prescribe that there be a "dealing" for conversion to lie.

(g) The Plaintiff's Title: Possession or a Right to Immediate Possession

The plaintiff in conversion needs to have had actual possession or a right to immediate possession. We have discussed actual possession under trespass above, where we noted that such possession is rather broadly understood, and that the defendant cannot oppose to it the superior right to possession of a third party. We will return to that opposeability feature in chapter 12 below; in that discussion we also have more to say about the actual possession feature.

We have already noted that the right to immediate possession sufficient for conversion may not be sufficient for detinue. There are, however, *dicta* in some authorities to the effect that the Law Reform Committee's more limited notion of the right for detinue, or something like it, applies to conversion also.[65] These authorities are, however, for the most part older ones, and probably no longer represent the law.[66] It does seem to us reasonable that conversion—or detinue for that matter—should be available to protect rights to immediate possession that may be asserted against the defendant, whether those rights are equitable or simply contractual or otherwise. The question, whether the forced sale measure of damages in conversion or the value of the goods in detinue is appropriate when the plaintiff has only a limited interest in them, raises an important issue, however. We return to it below.

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[64] Cmnd. 4774 (1971), para. 45, and *Act*, s.11(3).

[65] See *Childs* v. *Northern Railway* (1866), 25 U.C.Q.B. 165 (Q.B.); *Rogers* v. *Devitt* (1894), 25 O.R. 84 (Q.B.); and cf. *Hoodless* v. *Long* (1921), 67 D.L.R. 600 (Ont. C.A.). There are some American cases in a similar vein: *18 Am. Jur. 2d* (1965), Conversion, sec. 54.

[66] See *International Factors Ltd.* v. *Rodriguez*, *supra*, note 19, at 19, *per* Sir David Cairns for what we see to be the likelier modern view; accord, Bridge, *supra*, note 15, 37 n.103. But see *Leigh & Sillivan Ltd.* v. *Aliakmon Shipping Co. Ltd.*, *supra*, note 20 (buyer to whom risk but not legal title, possession or right to possession had passed could not sue shipper in negligence), which is discussed in chapter 4, below.

We also recognize a possible problem in this area where property is vested in a trustee with powers of management which cover bringing suit in conversion or detinue. We return to it in chapter 4 below, in the context of injury to a reversionary interest, which also raises the issue.

There is a somewhat related area of conversion law which could be mentioned here. It concerns situations where two or more persons have joint ownership of goods, and one of them deals with the goods in a way not authorized by the others. The law seems to be[67] that if the dealing does not amount to a destruction of the goods or its equivalent, and is not sufficient to confer a title good against the co-owners, the dealing is not a conversion.[68] The reason for this is that co-owners have concurrent possession of the goods co-owned, absent a special arrangement between them. Thus, it is said, merely possessory acts which do not amount to an assertion of a right of exclusive possession in the actor cannot ground a conversion action, although the acts may ground an action under any contract between the co-owners.[69] However, an innocent purchaser from the former co-owner who excluded one of the other co-owners from the property would be liable at least in an action for declaratory relief.[70]

We agree with the critics of this body of conversion learning[71] that it does not seem very sensible. The co-owner who sold or otherwise disposed without authority should be liable in conversion. Following the Law Reform Committee[72] and the *Torts (Interference with Goods) Act 1977*,[73] we would recommend that the law to the contrary should be changed. However, we note that the English Act appears to be meant to apply only to attempted dispositions of the absolute interest in the goods. Conversion by way of disposition is not so limited, and neither is our recommendation.

(h) Damages in Conversion

As we have indicated, the hallmark of conversion is the liability of the converter for damages equal to the value of the goods at the date of the

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[67] Canadian and American authorities support the statements in the text, but there are dissenting voices: see D. Derham, "Conversion by Wrongful Disposal as Between Co-owners" (1952), 68 L.Q. Rev. 507, at 513.

[68] See e.g. *Rourke* v. *The Union Insurance Company* (1894), 23 S.C.R. 344; *McIntosh* v. *Port Huron Petrified Brick Co.* (1900) 27 O.A.R. 262 (removal of goods from the jurisdiction).

[69] *Clerk & Lindsell on Torts*, 14th ed., *supra*, note 14, para. 1131.

[70] Although an estoppel would often operate here against the plaintiff: see Derham, *supra*, note 67, at 512; *Crossley Vaines' Personal Property*, 5th ed., E. Tyler & N. Palmer eds. (1973), at 56; and *Rourke* v. *The Union Insurance Company*, *supra*, note 68.

[71] The most notable of whom is Professor Derham: see his article, *supra*, note 67.

[72] Cmnd. 4774 (1971), para. 36; see also Derham, *supra*, note 67, at 511.

[73] S.10.

conversion. In addition, consequential loss may also be recoverable. Thus, where a defendant converted the tools of the plaintiff's trade, the plaintiff was able to recover not only their value but also damages for loss of his employment.[74] In the name of this principle, plaintiffs may be able to recover any rise in value between the conversion and the date of the hearing, at least where detinue would also lie.[75] This is subject to the plaintiff's duty to mitigate his loss, as we have seen.

In cases of conversion by disposition, it should be noted that the plaintiff can "waive the tort" and claim identifiable monetary proceeds in the defendant's hands as money had and received, or claim identifiable non-monetary proceeds in his hands as the plaintiff's own.[76] Also, because the defendant might be a constructive trustee of the proceeds, the plaintiff might have the remedies arising from that relationship as well.[77]

The English Law Reform Committee identified three problems in the damages area of conversion law. One was the rules for recovery of damages where the plaintiff had only a limited interest in the goods. Those rules are that the plaintiff relying on a right to immediate possession can only recover for the value of his interest. But a plaintiff relying on actual possession is entitled to recover as if he were owner.[78] This is an aspect of the common law position on the *jus tertii*, and is returned to when we discuss reform of that rule. In any event a plaintiff relying on actual possession who sues someone who also has a (different) interest in the goods can only recover after allowance for the defendant's interest.[79] The avoidance of circuity of actions, whereby the defendant ordered to pay for the goods sues the plaintiff for the value of the defendant's interest, dictates this result.

A second problem the English Law Reform Committee saw in the damages area was with the law when the value of the goods had been

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[74] *Bodley* v. *Reynolds* (1846), 8 Q.B. 779, explained in *France* v. *Gaudet* (1871), L.R. 6 Q.B. 199; and *Ralston Purina of Canada Ltd.* v. *Whittaker* (1973), 6 N.B.R. (2d) 443 (C.A.). But see also *Hutscal* v. *I.A.C. Ltd.* (1974), 48 D.L.R. (3d) 638 (Y.T.C.A.). Exemplary damages are also available in suitable cases of conversion: see e.g. *Grenn* v. *Brampton Poultry Co.* (1959), 18 D.L.R. (2d) 9 (Ont. C.A.).

[75] See references in note 5, *supra*. This measure may also apply where a defendant in conversion disposed of the goods before the plaintiff could demand them, and detinue does not lie because the defendant was not a bailee: *Aitken* v. *Gardiner*, *supra*, note 22. On value falls after conversion, see J.G. Fleming, *The Law of Torts*, 5th ed. (1977), at 67-68 and 68 n.15.

[76] See e.g. *Trusts & Guarantee Co.* v. *Brenner*, [1933] 4 D.L.R. 273 (S.C.C.) and *Frederick* v. *Gibson* (1905), 37 N.B.R. 126 (C.A.). On what "waiver" means here, see S. Hedley, "The Myth of Waiver of Tort" (1984), 100 L.Q. Rev. 653; he also points out that in fact no tort need be committed to make some one liable who benefits from asserting he has a property interest which is in fact the claimant's: at 663-66.

[77] See M.G. Bridge & F.H. Buckley, *Sales and Sales Financing in Canada* (1981), at 549-51.

[78] Fleming, *supra*, note 2, at 65.

[79] Cmnd. 4774 (1971), para. 55.

enhanced by a third party prior to the conversion. The problem they saw was largely the dearth of authority in this area. We consider this a sufficiently discrete and important topic that we devote a separate chapter to it, chapter 14, below.

The third problem the English Law Reform Committee saw in the damages area concerned goods with symbolic value, such as airline tickets or credit cards. The problem it saw arises this way. It is well established that if a security for money, such as a negotiable instrument, is converted, the damages at least *prima facie* are the face value of the instrument.[80] However, there is a first instance English judgment which says that this is inapplicable to all documents with symbolic value, and in particular, it is inapplicable to trading stamps.[81] The Law Reform Committee was worried that this judgment suggested a rigidity in the law. In their view, the law ought to allow for an extension of the negotiable instruments principle to other documents on a case-by-case basis.[82]

It seems to us that such a concern is misplaced. The case law, including what Canadian case law there is, suggests that the courts will adopt a flexible position in this area.[83] The more difficult problems concern dealings with goods with symbolic value which may not be sufficient for conversion or any other property tort, but which harm the economic interests represented by the goods. An example might be careless handling by a sub-bailee of the plaintiff's prize-winning lottery ticket, resulting in his inability to qualify for the prize because of the delay.[84] Here the common law seems capable of developing other remedies as appropriate.[85]

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[80] *Clerk & Lindsell on Torts*, 14th ed., *supra*, note 14, para. 1159.

[81] *Building & Civil Engineering Holidays Scheme Management Ltd.* v. *Post Office*, [1964] 2 Q.B. 430, rev'd. on other grounds [1966] 1 Q.B. 247 (C.A.).

[82] Cmnd. 4774 (1971), para. 91.

[83] See Palmer, *supra*, note 1, at 138-42; *Borden Chemical Co. (Canada) Ltd.* v. *J.G. Beukers Ltd.* (1973), 29 D.L.R. (3d) 337 (B.C.S.C.); and *Doyle* v. *Eccles* (1867), 17 U.C.C.P. 644.

[84] See *British West Indian Airways* v. *Bart* (1966), 11 W.I.R. 378 (Guyana C.A.).

[85] See Palmer, *supra*, note 1, at 138-42.

CHAPTER 4

INJURY TO A REVERSIONARY INTEREST AND OTHER CLAIMS

1. INTRODUCTION

Here we deal with a variety of causes of action for wrongful interference with goods which are less significant in the vindication of title to the goods than the others we have looked at. The causes of action in this chapter break down into two classes: one is for the tort of injury to a reversionary interest, which has traditionally been recognized as the fourth of the four property torts. We deal with it first.

The second class of causes of action covers ones not usually viewed as primarily ones by which title is vindicated, even if that is the effect of successfully invoking them. This class is dominated by the tort which has largely displaced that of injury to a reversionary interest, the tort of negligence.

2. INJURY TO A REVERSIONARY INTEREST

This is the property tort of least practical application. Its first major recognition was in an 1862 decision of the English Court of Common Pleas.[1] In that case the owner of a barge had leased it to a third party. The barge suffered severe damage owing to the carelessness of the defendants who had been employed to unload the barge. The distinguishing feature of the action this case recognized was the provision of a remedy to a plaintiff who had neither possession nor a right to immediate possession, but who did have a reversionary interest. The other elements of the action are "permanent injury"[2] to the chattel, occurring through the defendant's "wrongful act".[3]

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[1] *Mears* v. *London & South Western Railway Co.* (1862), 11 C.B.N.S. 850, 142 E.R. 1029; and see *McLeod* v. *Mercer* (1857), 6 U.C.C.P. 197, at 198.

[2] *Mears* v. *London & South Western Railway Co.*, *supra*, note 1, at 1031 (E.R.), *per* Williams J.

[3] *Ibid.*

Examples of persons for whom this action is of potential use, it has been suggested, include:

> a bailor of chattels for a certain term or a purchaser whose vendor retains goods under a lien, or the pledgor damnified by a premature sale by a pledgee before the pledgor's default.[4]

(a) The Plaintiff's Reversionary Interest

As explained, the plaintiff in this action need not have possession or a right to immediate possession. The nature of the interest that is required is called a reversionary interest, by which may be meant legal ownership or a legal special property.[5] If this is so, the action would not be available to holders of equitable interests in goods. The English Law Reform Committee commended such a position, on the basis that allowing holders of equitable interests a claim would create "much complication".[6] Such complication they saw as arising because of the concurrent claim of the holder of legal title, the trustee, through whom they felt a claim could and should be channelled.[7]

It seems to us that any such limited view of the action is not sensible in light of developments in the tort of negligence. The evolution of negligence after the 1862 recognition of the action for injury to a reversionary interest is probably the best explanation for the comparatively low reported use of that action. Negligence seems capable of covering all the negligence ground covered by the action for injury to a reversionary interest, and more besides. Developments in the area of liability for negligently inflicted economic loss make this plain. In this area the courts have been prepared to recognize claims for persons without any proprietary interest in goods on which their economic interests depend.[8] They have not uniformly done so, however. The most notable recent case is a House of Lords decision,[9] reversing the Court of Appeal, and holding that the buyer under a c & f contract to whom risk but not legal title, possession or the right to possession had passed at the relevant time, and to whom title did not pass subsequently by negotiation of the bill of lading, could not sue the shipper in negligence. This it was said was

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[4] See *Clerk & Lindsell on Torts*, 14th ed., by general eds. A.L. Armitage & R.W.M. Dias (1975), para. 1122.

[5] Cf. N.E. Palmer, *Bailment* (1979), at 186; but see J. G. Fleming, *The Law of Torts*, 7th ed. (1987), at 60 n.20.

[6] Cmnd. 4774 (1971), para. 34.

[7] *Ibid.*

[8] *Caltex Oil (Australia) Pty. Ltd.* v. *The Dredge Willemstad* (1976), 136 C.L.R. 529 (H.C. of Aust.); and see Edwards, Hopkins & White, "Annual Survey of Canadian Law: Torts: Part II" (1982), 18 Ottawa L. Rev. 379, at 386-88.

[9] *Leigh & Sillivan Ltd.* v. *Aliakmon Shipping Co. Ltd.*, [1986] 2 W.L.R. 902 (H.L.), discussed in M.G. Bridge, *Sale of Goods* (1988), at 186-88.

because the buyer had neither a possessory interest nor legal ownership. However, this case seems clearly out of line with the bulk of the other authorities.[10] If it is followed in Canada, it ought to be confined, as some passages in the report provide support for confining it, to the case's particular commercial context, where in the court's view well understood procedures to avoid this type of result existed.

It may be that holders of equitable interests in goods would not have to rely on this extension of negligence liability, but could rather invoke the proprietary nature of their interest.[11] In any event, that extension of negligence would make it reasonable to expect that the holders of equitable interests in goods could qualify for relief in negligence. Thus, in some circumstances the holder of the equitable interest might have suffered a loss for which the holder of the legal interest could not claim. An example would be harm to goods used by a lessee of the trustee in the business of the holder of the equitable interest. The trustee (holder of the legal interest) might not be able to successfully claim damages for injury to the business as opposed to damages for the loss of value of the goods themselves.

It is hard to believe that if the defendant's conduct was intentional courts would adopt a more restrictive attitude. The problem in this area is not, it seems, opening up the prospect of excessive litigation: the requirement at least for an equitable proprietary interest would seem to be a suitable type of limiting condition.[12] We agree with the English Law Reform Committee that a major difficulty is avoiding duplicative liability of the defendant, to reversioners and to the person with possession or the right to immediate possession. One example that occurred to us which would raise this problem was damage to goods subject to a security interest where the secured party sought to recover.[13] But the solution here would seem to lie not in peremptory denial of a claim if his interest was determined to be equitable. Rather, the solution to this problem would seem to lie in a direct attack on the multiple recovery problem which envisaged joinder of both the debtor and the secured party. We return to this type of solution when we discuss the *jus tertii* issue below. Thus, we do not agree with the Law Reform Committee's view that holders of equitable interests other than possessory ones should be denied proprietary claims.

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[10] Accord, Bridge, *supra*, note 9, at 187-88.

[11] The authors seem to be against this, however: see e.g. R. Goode, *Commercial Law* (1982), at 626. See too *Leigh & Sillivan Ltd.* v. *Aliakmon Shipping Co. Ltd.*, *supra*, note 9; but see Bridge, *supra*, note 9, at 145 n.227 (on this aspect of the case).

[12] Cf. Goode, *supra*, note 11, at 626; J.G. Fleming, *supra*, note 5, at 164-65.

[13] We note that the secured party is given a security interest in "proceeds" of his collateral by the *Personal Property Security Act, 1989*, S.O. 1989, c.16, s.25(1)(b); and that "proceeds" by s.1(1) includes "any payment representing indemnity or compensation for loss of or damage to the collateral or proceeds therefrom".

However, there is another problem which equitable interests raise and with which the English Law Reform Committee may have been concerned in this connection. This is that the equitable interest may arise under an express trust where it can be said that the chose in action for harm to a reversionary interest is vested in the trustee.[14] This issue arises in the other property torts also. Permitting the beneficiary to sue without at least joining the trustee would be to permit the usurpation of powers of management of the trustee. In the Ontario Law Reform Commission's 1984 *Report on the Law of Trusts* it considered whether the beneficiaries should be given the right to instruct the trustee as to the exercise of his powers, or whether the beneficiaries should at least be able to apply to a court for review of a trustee's action or inaction apart from any question of breach of trust.[15] The Commission concluded that the beneficiaries should have no such rights, but that their case law remedies for breach of trust should be supplemented. The Commission recommended that the revised *Trustee Act* it proposed should contain a provision empowering a court, upon application by a beneficiary, to direct a trustee to discharge his duty where he has refused or failed to discharge it. Also, the trustee could be required, where he had failed to consider in good faith and decide accordingly upon the exercise of a power, to satisfy the court that he had given such consideration to the power.[16] The Act the Commission put forward also contains a provision to the effect that the powers conferred upon trustees by the Act or the trust instrument or as a result of their having title to trust property are exercisable by them solely in their own discretion.[17]

This last provision seems to us to cover the relevant ground. Where the trustee is the proper plaintiff, and he has properly decided not to sue, the beneficiary should have no remedy. But we do not feel it is appropriate to foreclose further case law development on when the holder of legal title is the proper plaintiff, and what remedies the court should fashion for neglect by such holder of the discharge of his duties or his failure to consider the exercise of his powers.

(b) The Wrongful Act

As we have seen, this includes negligent interference with goods. As will be plainer from the next section, it also includes an intentional interference resulting in "permanent injury" to the goods.

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[14] See e.g. *92417 Canada Ltd.* v. *Canadian Film Development Corp. et al.* (1984), 10 D.L.R. (4th) 559 (Ont. H.C.) (conversion of funds to which plaintiff unit holders in a trusteed Canadian film investment were beneficially entitled).

[15] *Report on the Law of Trusts* (1984), Vol. I, at 72-79.

[16] *Ibid.*, Vol. II, Draft Act, s.16.

[17] *Ibid.*, s.14.

(c) PERMANENT INJURY

This includes physical destruction. But "permanent injury" also includes physical damage short of destruction, or even of irreparable damage. Any physical harm will do, it would seem, provided that it is the sort of damage not likely in the ordinary course of things to be repaired before the plaintiff's right to possession arises.[18]. But "permanent injury" is still wider than this. It has been held to cover a case where, by the defendant's negligence, a thief was able to make away with the defendant's goods in circumstances where the goods became untraceable.[19] "Permanent injury" also covers situations where the defendant was able to confer a title on another which by virtue of the *nemo dat* exception is proof against the plaintiff's interest.[20]

It is clear, however, that the tort does not include situations where goods are dealt with in a way that would be conversion of them at the suit of a person with a possessory interest, but which does not cause a "permanent injury" to them in any of the senses just outlined. An example would be where a pledgee before default resells the pledged goods which remain undamaged and readily accessible[21]. The holder of a non-possessory interest appears to have no other remedy for this type of conduct.

The Law Reform Committee thought the holder of a non-possessory interest (not being an equitable one) should have a remedy. They felt, with Sir John Salmond, that "the difference between the person entitled to immediate possession and the reversionary owner [is] relevant to damages, but not to the injury committed".[22] We share this view, except that we would not exclude holders of equitable interests. Again, as with the discussion of the plaintiff's reversionary interest, we are of the view that the major difficulty in this area is multiple liability of the defendant, to the holder(s) of the possessory interest and to the holder(s) of the non-possessory ones. Again, we return to this when we discuss the *jus tertii* problem later.

3. OTHER DAMAGES ACTIONS

To this point in our Study Paper, we have reviewed salient features of the present law concerning the four property torts. We have indicated at a number of points that there are a number of other remedies which serve

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[18] Palmer, *supra*, note 5, at 154.

[19] *Ibid.*, at 153; *Moukataff* v. *B.O.A.C.*, [1967] 1 Lloyd's Rep. 396 (Q.B.D.), at 416.

[20] Palmer, *supra*, note 5, at 154.

[21] Cf. *Clerk & Lindsell on Torts*, 15th ed., by general ed. R.W.M. Dias (1982), para. 21-126.

[22] J. Salmond, "Observations on Trover and Conversion" (1905), 21 L.Q. Rev. 43, at 54, as quoted in Cmnd. 4774 (1971), para. 34. Apparently, this position has already been arrived at in some American states: W. L. Prosser & W. Page Keeton *et al.*, *Law of Torts*, 5th ed. (1984), at 104-05; and see *Rest. 2d Torts* (1965), sec.243.

similar purposes, notably certain restitutionary proceedings, such as the action for money had and received, and negligence actions.

There are however other possibilities. The one most commonly mentioned in the literature is slander of title, the cause of action where the defendant has "maliciously" made a false statement impugning the plaintiff's title to personalty in consequence of which he has suffered damage.[23] An example would be where the plaintiff's bargain to sell goods to a third party breaks down because of the defendant's slander.[24] Malice requires at least a lack of an honest belief that the claim being made is well founded; it may also require an intent to injure the plaintiff.[25]

All of this does not exhaust the possibilities, it seems. Thus, it was said in an English case[26] that there was a cause of action where the defendant claimed title to the plaintiff's goods and benefited from doing so, although his conduct might otherwise be insufficient to ground liability under any of the other remedies discussed in this chapter. The plaintiff carriers brought an action for the value of the goods which they had delivered by mistake to the wrong business, and which the defendant had purported to sell to that business. That business had paid for the goods and used them. On a challenge to the sufficiency of the plaintiff's statement of claim, the court ruled that conversion, at least as traditionally understood, was not made out by these pleadings. Nevertheless, they disclosed a good cause of action which after the abolition of the forms of action was sufficienty pleaded.

All of this suggests a rich variety of possible causes of action for the holder of an interest in goods, even if (as we have endeavoured to show at a number of points) there appear to be cases where the remedial array may be insufficient. This raises the question whether our legal system needs such a variety, a question which the Law Reform Committee also addressed. This is a question to which we turn in the next chapter.

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[23] See *Clerk & Lindsell on Torts*, 15th ed., *supra*, note 21, ch. 19.

[24] *Ibid.*, para. 19-02.

[25] *Ibid.*, paras. 19-11 to 19-14.

[26] *Van Oppen and Co., Ltd.* v. *Tredegars, Limited* (1921), 37 T.L.R. 504 (K.B.D., *per* Darling J.).

CHAPTER 5

THE QUESTION OF A NEW CAUSE OF ACTION OR UNIFICATION OF EXISTING ONES

1. THE COMPLEXITY OF THE PRESENT LAW

We have seen that the existing law on damages relief, with its four property torts, and related causes of action, is formidably complex. Still further complexity will emerge when forms of specific relief are discussed in the chapters immediately following this one.

Our Empirical Survey revealed that the profession in fact often does not classify causes of action in this area under the relevant label or labels. Instead, they utilise the freedom offered by our system of fact-based pleading.[1] When the law is examined fairly closely as we do in this Study Paper, we believe that it shows itself to be a considerable distance from the simple proposition that whenever a person's goods are wrongfully interfered with, that person should have a remedy. We endeavour in this Study Paper to deal with the deficiencies in present law which we saw. But this Study Paper is not an exhaustive survey of the law. Other deficiencies may well exist which should be dealt with. We in fact suggest some further lines of inquiry in our last chapter.

2. REDUCING THE COMPLEXITY

All of this raises the question of whether the law might not be simplified and made more accessible. We considered a number of proposals. One, to which initially we were very attracted, was the creation of a new cause of action for wrongful interference with goods. Depending upon the characteristics of the claimant's case there would be various forms of relief available: various forms of specific relief, various measures of damages. The existing nominate torts would be swept away, and the conceptual unity of the law in this area would be emphasized.

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[1] We would note that where one of the relevant labels is used, but in error, that in itself will not affect the claim for relief: see D. Bentley, "A New-Found Haliday; The Eighteenth Report of the Law Reform Committee (Conversion and Detinue)" (1972) 35 Mod. L. Rev. 171, at 172.

The Law Reform Committee in its *Eighteenth Report* considered just such a proposal.[2] They rejected it for reasons which seem to us to be sound. The drafting of a statute like this would likely be very cumbersome indeed. To this we would add that it would seem to require a more complete inquiry into the field of personal property law than we or the English were able to accomplish. And it is unclear to us that such an inquiry would be warranted by the problems it might unearth.

We also considered a variant on the approach the Committee rejected that initially seemed to us a response to their concerns. This variant would have the relevant statute announce in simple and direct terms that wherever there was wrongful interference with goods, there should be power in the courts to give the appropriate relief to the appropriate person. Forms of wrongful interference, types of relief and types of interest in goods might be listed, as illustrative, using the findings and recommendations in this Study Paper.

However, we concluded that this variant was not an appropriate approach either. The concern we felt about it was that it might create considerable uncertainty about the status of the bulk of present law, with which there did not seem to be a serious problem.

In our view present law broadly considered responds in a generally sensible way to the two basic variables in this area.[3] One variable is the nature of the interference with the goods. The more serious it is, in terms of duration, physical harm or assertion of an interest in the goods inconsistent with the claimant's, the more substantial the remedy. The other variable is the nature of the claimant's relationship with the goods. The more immediate a person's relationship is with the goods, the more remedies he has. Having said this, however, we would indicate at this point that we believe this open-ended variant on the approach of the new global tort to be the right general idea. This is a point we will shortly return to.

Another approach to reform of the law in this area which we addressed was much more modest, and drew on the *Torts (Interference with Goods) Act 1977*. The *Act* proceeds by calling broadly all the existing causes of action in this area (after it had abolished detinue) "wrongful interference" or "wrongful interference with goods".[4] This is for the purpose of its provisions on a number of topics that we return to in later chapters: the range of appropriate relief[5], damages as compensation for the whole of a person's interest in

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[2] Cmnd. 4774 (1971), paras. 31, 32.

[3] See also Bentley, *supra*, note 1, at 171-72.

[4] Ss.1, 2.

[5] Ss.3, 4.

goods[6], an allowance for improvement of goods[7], and the *jus tertii* problem.[8] Other provisions in the *Act* do not use the term, however, but rather employ "conversion" and "trespass" for the purpose of the specific features of those torts they deal with.[9]

A commentator on the English *Act* has suggested that it may encourage courts to consider the conceptual unity of the area, which would tend to move them away from the compartmentalized thinking characteristic of the property torts.[10] We consider such a movement to be as desirable as retaining the basic lessons of present law. But we do not favour the English *Act* as the model for this purpose.

Our basic problem with the English *Act* is that it does not appear to us to sufficiently emphasize the conceptual unity in this area. We have a model in mind here which seems to us to suggest how better to build on existing law while moving the law away from preoccupation with the nominate causes of action we have seen. This model, from the public law of Ontario, is the *Judicial Review Procedure Act* (the *JRPA*).[11] We believe the model this Act represents shows how an approach like the open-ended variant on the new global tort can be married with the preservation of the basic lessons of present law.

The *JRPA* brought together existing remedies, under the prerogative writs, re-classifying them as species of the genus proceedings for judicial review. The *Act* appears to be a successful borrowing of existing law coupled with provision for the encouragement of further development by focusing on general remedial principles.[12]

The *JRPA* model also seems to us to be preferable to the English Committee's, which was in effect to unify the existing four property torts into a new tort.[13] The English proposal rightly emphasized the unity of the

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[6] S.5.

[7] S.6.

[8] Ss. 7, 8, 9.

[9] Ss.10, 11. The other substantive provisions of the *Act*, on uncollected goods, are dealt with below, in ch.16.

[10] G. Samuel, "Wrongful Interference with Goods" (1982) 31 I.C.L.Q. 357, at 384. However, the indications of this are not very strong, as he seems to acknowledge.

[11] R.S.O. 1980, c.224.

[12] See generally on the *Act* J. Evans, H. Janisch, D. Mullan and R. Risk, *Administrative Law [:] Cases, Text, and Materials*, 2nd ed. (1984), at 832-844, which notes the debate about the actual impact of the *Act* on the substantive law of judicial review; and see *ibid.*, at 870-872 (extract from Justice Canada, *Proposals to Amend the Federal Court Act* (1983), which commends an approach similar to one we envisage here).

[13] Cmnd. 4774 (1971), paras. 27 (trespass, detinue and conversion), 34 (injury to a reversionary interest and conversion).

torts. Our major difficulty with the proposal is that it did not allow for the other causes of action in this area, notably ones for specific relief, negligence and where the tort is "waived". It seems to us that reform here must take account of them also, as well as, as we will shortly see, the law of recaption.

In chapter 15 of this Study Paper we set out in broad outline the type of reform statute we have in mind. As we have mentioned at a number of points already, a draft bill for a *Remedies for Wrongful Interference with Goods Act* is an appendix to this Study Paper. It is now necessary to confront the other major form of relief for wrongful interference with goods, namely, recovery of the goods *in specie*.

CHAPTER 6

SPECIFIC RELIEF

1. INTRODUCTION

Neither the common law courts nor courts of equitable jurisdiction developed a remedial structure which vindicated property in goods by even a *prima facie* right to recovery *in specie*. The historical reason for this omission appears to be very complex.[1] Although the 12th century processes of the "appeal of larceny" and "*res adiratae*" were aimed primarily at the recovery of goods wrongfully taken or detained,[2] as the 13th century progressed the restorative aspect of the procedures was de-emphasized in favour of a criminalization of the procedures and the forfeiture of the goods to the Crown. Return of the goods to the victim whose timely action had facilitated apprehension of the felon was a matter of discretion.[3] The civil remedy which developed to vindicate the right of a victim to goods was trespass *de bonis asportatis*[4] but this action sounded only in damages.[5] The underlying cause may have been that for various reasons of public peace and conceptual inability goods were thought of as the property of the person in possession of them.[6] The development of a concept of right to possession only came later in the 15th century.[7] It is true to say that the Ecclesiastical

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[1] Weir identifies a number of problem-creating results which flowed from the ingestion of property concepts into tort law. For example, concerning appropriate remedies, in tort one thinks in terms of money compensation whereas a property concept speaks in terms of a right of recovery *in specie*. In addition, the law of bailment, with its contractual roots, will affect property concepts: see Tony Weir, *A Casebook on Tort*, 4th ed. (1979), at 397-402. The common law preoccupation with the law of actions gave rise to an emphasis on factual analysis and procedural devices which loaded property concepts with conceptual difficulties: see G. Samuel, "Wrongful Interference With Goods" (1982), 31 I.C.L.Q. 357, at 383; English Law Reform Committee, *Eighteenth Report (Conversion and Detinue)*, Cmnd. 4774 (1971), paras. 4-10.

[2] F. Pollock and F. Maitland, *The History of English Law (Before the Time of Edward I)* 2nd ed. (1968), Vol. 2, at 160; W. Holdsworth, *A History of English Law* (1966), Vol. III, at 320.

[3] Pollock and Maitland, *supra*, note 2, at 165-66.

[4] *Ibid*.

[5] Holdsworth, *supra*, note 2, at 323.

[6] C.A. Branston, "The Forcible Recaption of Chattels" (1912) 28 L.Q. Rev. 262.

[7] Pollock and Maitland, *supra*, note 2, at 81, 173.

Courts gave relief in a broad range of civil contracts based on the principle of *laesio fidei*. However, by the beginning of the 16th century the jurisdiction of the Ecclesiastical Courts came into question with its consequent eclipse in the face of the rise of an independent Chancery Court. The early Court of Chancery developed along the lines of the Ecclesiastical Courts to enforce process specifically. However, in the 19th century, emphasis on legal formalism and laissez-faire attitudes to contract law led to a decline in the readiness of Chancery to grant specific performance in contracts of sale of goods or specific delivery of chattels wrongfully detained.[8]

Perhaps ironically, it was replevin statutes in Canadian and American common law jurisdictions and the defence of recaption which developed to provide at least a *prima facie* right to recovery *in specie*. As will be seen later we recommend reversing the present position by giving a plaintiff who proves that the defendant has committed one of the property torts, either at the interlocutory or final stages of an action, a right to recover the goods *in specie*, unless the court is satisfied that some other disposition would be more appropriate. In addition, we recommend that the defence of peaceable recaption be retained with some modifications. Here we set out the present law concerning specific relief.

2. COURT ORDERED REMEDIES—COMMON LAW

(a) Detinue

Prior to the 19th century, the action of detinue suffered from procedural disadvantages which by the end of the 16th century caused it to be superseded by the tort of conversion.[9] In the 19th century detinue was revived, having shed many of its procedural disadvantages. Nevertheless, the problem with the action was that before 1854 the successful plaintiff could get judgment only in the form of delivery up of the chattel or payment of its value as assessed, and for payment of damages for its detention. In effect, this gave the unsuccessful defendant the option of whether to return the chattel or pay its value. If the plaintiff wished to insist on specific restitution of the chattel he had to have recourse to Chancery.

By the *Common Law Procedure Act* of 1854[10] the common law courts gained the power to order delivery up of the chattel without giving the option of paying the assessed value. An identical provision appeared in the

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[8] J. Berryman, "The Specific Performance Damages Continuum: A Reappraisal of Contract Remedies" (1985) 17 Ottawa L. Rev. 295.

[9] Cmnd. 4774 (1971), para. 7.

[10] 17 & 18 Vict., c.125 (U.C.), s.78.

Common Law Procedure Act of Upper Canada (1856). However, this discretion was administered along equitable lines:

> The power vested in the Court to order the delivery up of a particular chattel is discretionary, and ought not to be exercised when the chattel is an ordinary article of commerce and of no special value or interest, and not alleged to be of any special value to the plaintiff, and where damages would fully compensate.[11]

(b) Replevin

The common law action of replevin was an ancient remedy the origin of which is exceedingly difficult to fix with any precision.[12] Like trespass, it was an action *ex delicto*. It appears to have developed out of the writs of *rescous* and *de parco fracto* and to have been available to the distrainee whose goods were wrongfully distrained. The writ of replevin was at first confined to cases of wrongful distraint where the distrainor for damage feasant, rent, or feudal services claimed no property in the chattels but only a debt owing to him. In such a case trespass would not lie because the distrainor claimed no property right in the chattels.[13] The writ of replevin issued out of Chancery and directed the sheriff to take security from the defendant and return the chattels to the plaintiff. At the hearing of the case the issue was not the title to the chattels (that was clearly admitted by the distrainor-defendant to be in the distrainee-plaintiff) but rather how much, if any, money was owing by the plaintiff to the defendant.[14] By the *Statute of Marlebridge* in 1267[15] the delay necessary to obtain a writ from Westminster was overcome and the sheriff was directed, upon receipt of the complaint, to replevy the chattels to the plaintiff. In order to overcome abuse of the writ of replevin, later statutes required the sheriff to take security that the suit would be prosecuted to a successful conclusion and the goods returned to the defendant if so ordered, or the value paid to the defendant.[16]

Originally, if the distrainor-defendant claimed any title (rather than an avowry, i.e., money owing) the writ of replevin was abated. By the reign of Edward III the remedy was available for any wrongful taking, but this

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[11] *Cohen* v. *Roche*, [1927] 1 K.B. 169, at 181, quoting *Whitely Ltd.* v. *Hilt*, [1918] 2 K.B. 808, at 819; see also *Henry* v. *Columbia Securities Ltd.*, [1942] 4 D.L.R. 596 (B.C.S.C.).

[12] *Kurzweil* v. *The Story & Black Piano Co.* (1916), 159 N.Y. Supp. 231, at 234-235. In *Freeman* v. *Harrington* (1863), 5 N.S.R. 352 (C.A.), at 354, Young C.J. said: "...no action, either in its foundation or its practice, has given rise to so many contradictory expositions as that of replevin in the English Courts".

[13] J.B. Ames, "History of Trover" (1897) 11 Harv. L. Rev. 277, at 374.

[14] Finkelstein, "The Plea of Property in a Stranger in Replevin" (1923) 23 Col. L. Rev. 652.

[15] 52 Henry III, c.21.

[16] 13 Edw. I, c.2, s.1; 11 Geo. II, c.19.

apparently made little difference to the case law where it was rarely used except in cases of wrongful distraint.[17] In England the remedy never developed beyond being available in cases of wrongful taking.[18]

In *Cornell* v. *Quick*,[19] in 1831, it was decided that the remedy existed at common law in Upper Canada but that there were no court officers to effect the remedy—the sheriff having insufficient judicial power to follow the English rule, and the procedure to take the action out of the County Court into King's Bench being unavailable.[20] In 1834 the replevin remedy was made available in Upper Canada in cases of wrongful distress.[21] Section 2 of the *Replevin Act*[22] reads:

> Where goods, chattels, deeds, bonds, debentures, promissory notes, bills of exchange, books of account, papers, writings, valuable securities or other personal property or effects have been wrongfully distrained or have been otherwise wrongfully taken or detained, the owner or other person capable of maintaining an action for damages therefor, may bring an action of replevin for the recovery thereof and of the damages sustained by reason of the distraint, taking or detention.[23]

Thus, by the terms and history of the *Replevin Act*, any person who is the owner of enumerated types of property, or is capable of maintaining an action for damages for a wrongful distraint, taking or detention, may replevy the property from the detainer.[24] A person who could maintain such

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[17] Ames, *supra*, note 13, at 375; *Salmond & Heuston on Torts*, 19th ed., by R.F.V. Heuston & R.A. Buckley (1987), at 128-29. The wider availability of the remedy is underscored by Lord Redesdale in *Shannon* v. *Shannon* (1804), 9 R.R. 36.

[18] *Salmond & Heuston on Torts*, *supra*, note 17, at 109; *Winfield and Jolowicz on Tort*, W.H.V. Rogers ed. (1979), at 472.

[19] (1831), Drap. Rep. 427.

[20] Macaulay, J., dissenting, usefully reviewed the English practice.

[21] 4 Wm. IV, c.7; C.S.U.C. 1792-1840, Vol. 1, at 1095.

[22] R.S.O. 1980, c.449 (repealed by the *Courts of Justice Act, 1984*, S.O. 1984, c.11, s.210).

[23] The wording in the statute of 14 & 15 Vict., c.64, s.1 provided "...the owner or person or corporation, who by law can now maintain an action of trespass or trover for personal property, shall have and may bring an action of Replevin..." The change to the present wording appeared first in R.S.O. 1897, c.66, s.2 with no amending legislation or explanation. One conjectures that the change took place because of the abolition of the forms of action and the assimilation of trover and to some extent trespass by the new and voracious tort of conversion: 1856, 19 Vict., c.43 (Can.), ss.17, 140, form B. 14. See also: J. Salmond, "Observations on Trover and Conversion" (1905) 21 L.Q. Rev. 43; W. Prosser, "The Nature of Conversion" (1957) 42 Corn. L.Q. 168.

[24] All the common law jurisdictions of Canada have a replevin or a replevin-like remedy which offers something approaching a *prima facie* right of recovery *in specie* to a plaintiff who shows a *prima facie* right to immediate possession. Legislation and court rules which can be easily identified with replevin statutes are: Manitoba Queen's Bench rules 317-327; Saskatchewan Queen's Bench rules 406-410; Alberta Rules of Court

an action for damages would include one who could maintain a detinue action[25] or a conversion action.[26] There is also authority that replevin would lie in favour of a plaintiff with an equitable title.[27] Indeed, there is some indication that replevin would lie at the instance of a plaintiff with a mere personal right to the goods arising out of a contract of sale of goods or otherwise.[28]

In 1880, the writ of replevin was abolished[29] and the remedy assumed the character of an interlocutory application for the recovery of goods.[30] Ontario Rule of Civil Procedure 44.01(1) now provides that an interim order for recovery of possession of personal property may be obtained on motion showing the factual elements of a wrongful detaining of personal property, that is to say, the allegation of facts identifying and placing a money value on the property, and setting out the details of the applicant's right to immediate

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427-436; *Recovery of Goods Act*, R.S.B.C. 1979, c.357. Newfoundland appears to restrict the remedy to cases of wrongful distraint: *The Judicature Act, 1986*, S.N. 1986, c.42, s. 137. Rules of procedure which are modern rewrites of replevin legislation are: Nova Scotia Civil Procedure Rule 48; Prince Edward Island Rule of Supreme Court 48. New Brunswick Rule 44 and Ontario Rule of Civil Procedure 44 drop any use of the word "replevin" and refer rather to "interim recovery of personal property".

25 See *supra*, ch. 3.

26 See *supra*, ch. 3.

27 *Carter* v. *Long* (1896), 26 S.C.R. 430.

28 *A.-G. Canada* v. *Hoverlift Systems Ltd.* (1981), 120 D.L.R. (3d) 332 (Alta.); see also *International Factors Ltd.* v. *Rodriguez*, [1979] 1 All E.R. 17 (C.A.), at 21, where Buckley, L.J., opined that a mere personal right to possession of a cheque would found a conversion action. *Haessler-De Way Ltd. v. Color Tech Inc.* (1985), 49 C.P.C. 156 (Ont. Dist. Ct.) is a case where the plaintiff's motion was unsuccessful because no right to possession, legal, equitable or personal was alleged.

29 Rule 1098 of 1888 abolished the writ of replevin. For a brief history of the Ontario practice see *Myers* v. *Brown*, [1960] O.W.N. 441.

30 The *Replevin Act*, *supra*, note 22, and Ontario rules 358-368 were repealed by the proclamation of the *Courts of Justice Act, 1984*, c.11, s. 210, on January 1, 1985, and replaced by s. 117 of the *Courts of Justice Act, 1984*, and Rule of Civil Procedure 44.

Section 117 of the *Courts of Justice Act, 1984* reads as follows:

> *Interim Order for Recovery of Personal Property*
>
> 117.—(1) In an action in which the recovery of possession of personal property is claimed and it is alleged that the property,
>
> (a) was unlawfully taken from the possession of the plaintiff; or
>
> (b) is unlawfuly detained by the defendant, the court, on motion, may make an interim order for recovery of possession of the property.
>
> *Damages*
>
> (2) A person who obtains possession of personal property by obtaining or setting aside an interim order under subsection (1) is liable for any loss suffered by the person ultimately found to be entitled to possession of the property.

possession and the wrongful detention. Rule of Civil Procedure 44.01(2) provides that the motion may be made without notice to the defendant if it appears that the defendant might improperly attempt to prevent recovery of possession of the property or for any other sufficient reason.

Rule of Civil Procedure 44.03(1) provides:

> (1) On a motion for an interim order for recovery of possession of personal property made on notice to the defendant, the court may,
>
> (a) order the plaintiff to pay into court as security twice the value of the property as stated in the order, or such other amount as the court directs, or to give the appropriate sheriff security in such form and amount as the court approves, and direct the sheriff to take the property from the defendant and give it to the plaintiff;
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> (b) order the defendant to pay into court as security twice the value of the property as stated in the order, or such other amount as the court directs, or to give the plaintiff security in such form and amount as the court approves, and direct that the property remain in the possession of the defendant; or
>
> (c) make such other order as is just.[31]

The security required by rule 44.03 is conditioned on the party giving the security returning the property without delay to the opposite party if so ordered by the court and paying any damages and costs the opposite party has sustained by reason of the order.[32] The court on motion may set aside or vary the order or stay enforcement of it.[33] The sheriff is directed to serve the order on the defendant at the time of the recovery of the property or as soon thereafter as is possible[34] and he may move for directions from the court if he is unable to comply with the order or it is dangerous to attempt compliance.[35] Where the defendant prevents recovery of the goods by the sheriff, the court may order him to take and deliver to the plaintiff other goods of the defendant and order the plaintiff to hold the substituted property until the defendant surrenders the subject property to the plaintiff.[36]

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[31] Rule of Civil Procedure 44.03(2) provides that where the motion is made without notice to the defendant, the court may order the sheriff to take security as ordered and recover possession of the property but retain the property for a period of ten days before delivering it to the plaintiff; or make such other order as is just.

[32] Rule of Civil Procedure 44.04 provides that where the security is a bond it must be in Form 44A (44.04(2)) and where the bond is given by any person other than a guarantee company to which the *Guarantee Companies Securities Act* applies, then the person giving the bond must be approved by the court (44.04(3)).

[33] Rule of Civil Procedure 44.05.

[34] Rule of Civil Procedure 44.07(2).

[35] Rule of Civil Procedure 44.07(3).

[36] Rule of Civil Procedure 44.08.

The essence of the replevin remedy is that it is an effective procedure to recover goods *in specie* and is available to anyone who alleges that the goods are wrongfully detained and is prepared to post security as ordered by the court, subject to a power in the court to order some other appropriate disposition. The jurisprudence relating to replevin before the recasting of the remedy in 1984[37] establishes the characteristics of the remedy set out below. Neither the history nor the terms of the 1984 changes would indicate that any reform of these particular attributes of the remedy was intended.[38]

(a) As indicated above, the remedy is available in a very broad range of fact situations giving rise to an allegation of wrongful detention. These appear to include not only legal and equitable property rights but also personal rights to immediate possession arising out of contract.

(b) The scope of the inquiry on the return of the motion for a replevin order is to require the plaintiff "to show the facts upon which it bases its claim, and if these facts afford substantial grounds for the plaintiff's claim, then the order should be granted".[39]

(c) If the defendant wishes to retain the property in face of the plaintiff's *prima facie* right to immediate possession, he must be prepared to meet the requirement of posting security in the same terms as is required of the plaintiff.[40] Parenthetically, it can be

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[37] *Supra*, note 30.

[38] Watson and McGowan, *Ontario Supreme and District Court Practice 1987* (1986), at 491 describes the revision as follows: "This Rule, and s. 117 of the *Courts of Justice Act*, replace the *Replevin Act* and the order of replevin with a more streamlined but not dissimilar procedure of an 'interim order for the recovery of possession of personal property'". M.G. Bridge acknowledges that replevin relief may have offered some advantages; but he opines that Ontario Rule 44 "would appear likely to diminish at least some of this advantage": M.G. Bridge, *Sale of Goods* (1988) at 733, n.407. See also G. Stewart, Case Comment (1984) 62 Can. Bar Rev. 418.

[39] *Ryder Truck Rental* v. *Walker*, [1960] O.W.N. 70 (Ont. Master), at 71; aff'd [1960] O.W.N. 114 where Ferguson, J., spoke in terms of a *prima facie* right to possession; *Midland-Ross of Canada Limited* v. *Bachan Aerospace of Canada Limited and The Toronto Dominion Bank* (1983), 3 P.P.S.A.C. 21 (Ont. M. Ch.) aff'd on appeal to Hollingworth, J. (Aug. 5, 1983); leave to appeal to the Divisional Court denied by Sirois, J. (Oct. 3, 1983); *Edwards* v. *Phillips* (1983), 36 C.P.C. 239 (Ont. M. Ch.). See also *Harpe* v. *Koshman* (1987), 48 Alta. L. Rep. 37 (C.A.). The case involved an appeal from a judgment affirming an *ex parte* order of replevin. In response to the moving party's claim to title, the respondent filed an affidavit claiming title in the subject goods. Kerans, J.A. (for the court) indicated that "Replevin is in the nature of final relief, and should not have been affirmed in the face of conflicting affidavit evidence as to title." Presumably the court meant that replevin orders are very often dispositive of the issue of possession and should not be given where there are credible conflicting claims as to the right of possession.

[40] Rule of Civil Procedure 44.03(1); *Thompson* v. *Thompson*, [1947] O.W.N. 393, decided under old rule 361, which is almost identical to present rule 44.05.

noted that the historical liability of the plaintiff on the bond has now been extended to the defendant who resists or sets aside an order for interim recovery of property.[41]

(d) It appears that a plaintiff who has replevied property into his possession will retain possession as a matter of right after his right to immediate possession is upheld upon a trial of the issue.[42]

3. COURT ORDERED REMEDIES—EQUITY

(a) INTRODUCTION

Broadly speaking, the issue of the availability of equitable remedies for recovery of goods *in specie* will arise either in a sale of goods context[43] or else in the context of some other alleged wrongful detainer. In the sale of goods context the common law detinue action would at least be available where the plaintiff has an immediate right to possession arising out of a legal property right.[44] Typically this would be a purchaser to whom legal title to the goods has passed. Absent the passage of legal title, the only possibility of recovery *in specie* available to the purchaser is a decree of specific performance or an injunction (other than the possibility of a replevin order as discussed *infra*). In fact situations not arising out of contracts for the sale of goods, the claimant will usually rely on a legal or equitable title. In the case of a legal title the detinue remedy would lie. In the case of an equitable title it is not at all clear that detinue would lie[45] and, subject to the possibility of a replevin order, an equitable remedy may be the only remedy available.

(b) SPECIFIC PERFORMANCE

Perhaps the surest way to put a purchaser of goods in the same position as if the contract had been carried out is to order the defendant to specifically perform the contract. However, the courts of equity traditionally refused to grant specific performance unless damages could be demonstrated to be an inadequate remedy. This historical approach can be explained both on jurisdictional grounds[46] as well as on grounds which we

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[41] *Courts of Juctice Act, 1984*, c.11, s. 117(2).

[42] J.G. Fleming, *The Law of Torts*, 5th ed. (1977), at 73; *66 Am. Jur. (2d)*, Replevin (1973), at 896.

[43] See generally Bridge, *supra*, note 38, at 730-737.

[44] *Supra*, ch. 3.

[45] *Ibid.*

[46] *Corbin on Contracts* (1964), at 109-111; S.M. Waddams, *The Law of Contracts*, 2d ed. (1984), at 511-12.

would now describe as economic efficiency.[47] By the end of the 19th century, and in spite of section 50 of the *Sale of Goods Act*[48], the general rule that a decree of specific performance was not available for contracts of sale of commercial goods became crystallized.[49] However, decrees of specific performance or its injunctive equivalent are sometimes granted where chattels are difficult to obtain[50] or the plaintiff would have grave difficulty proving damages.[51]

The decisions are notoriously inconsistent and fact-dependent.[52] The adequacy of damages test as it points to damages as the presumptive remedy is often defended on the grounds of economic efficiency,[53] although it is very arguable that each case is too context-dependent to justify the presumption on economic grounds.[54]

(c) Injunctions

The injunction in the sale of goods context attracts some of the discretionary elements of a decree of specific performance which, after all, is

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[47] In *Buxton* v. *Lister* (1746), 3 Atk. 383, 26 E.R. 1020 (sale of parcels of wood), at 1021, the Lord Chancellor explained the court's usual reluctance in the following terms:

> ...for as those are contracts which relate to merchandise, that vary according to different times and circumstances, if a court of equity should admit such bills, it might drive on parties to the execution of a contract, to the ruin of one side, when upon an action, that party might not have paid, perhaps, above a shilling damage.
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> Therefore the courts have always governed themselves in this manner, and leave it to law, where the remedy is so much more expeditious.

[48] R.S.O. 1980, c. 462: "In an action for breach of contract to deliver specific or ascertained goods, the court may, if it thinks fit, direct that the contract be performed specifically, without giving the defendant the option of retaining the goods on payment of damages, and may impose such terms and conditions as to damages, payment of the price, and otherwise, as to the court seems just."

[49] *Cohen* v. *Roche*, *supra*, note 11; *Carter* v. *Long*, *supra*, note 27, at 436; Bridge, *supra*, note 38, at 733.

[50] Bridge, *supra*, note 38, at 734.

[51] *Ibid.*, at 735.

[52] Compare *George Eddy Co. Ltd.* v. *Corey*, [1951] 4 D.L.R. 90 (N.B.S.C. App. Div.) and *Societe des Metalurgiques S.A* v. *Bronx Engineering Co. Ltd.*, [1975] 1 Lloyd's Rep. 465 (C.A.).

[53] A. Kronman, "Specific Performance" (1977) 45 U. Chi. L. Rev. 351; E. Yorio, "In Defense of Money Damages for Breach of Contract" (1982) 82 Col. L. Rev. 1365.

[54] See A. Schwartz, "The Case for Specific Performance" (1979) 89 Yale L.J. 271; G. Treitel, "Specific Performance in the Sale of Goods" [1966] J. Bus. L. 211; P. Linzner, "On the Amorality of Contract Remedies - Efficiency, Equity and the Second Restatement" (1981) 81 Col. L. Rev. 111.

functionally very similar to an injunction.[55] In the non-contractual context the injunctive remedy takes the form of an order for specific restitution and is similar to the specific performance remedy in requiring that damages be inadequate, that is, the goods are in some way unique and of some special value to the claimant. The inadequacy of damages in this respect has historically been associated with a *pretium affectionis*.[56] In more modern times the remedy has extended to all items of a personal or confidential nature as well as, in some cases, to quite ordinary chattels such as wool,[57] a die,[58] and coal wagons.[59] In each of these instances the chattels represented something other than an ordinary article of commerce which the plaintiff could readily replace by going timely into the market.

The interlocutory injunction is available in both contractual and non-contractual fact situations. This is so even though it is quite clear that the injunction amounts to specific performance, at least until the trial of the action, and that the injunction, although couched in prohibitory terms, is in substance a mandatory injunction.[60] The remedy is appropriate and necessary where the denial of relief to the plaintiff would result in particular hardship. The exercise of the judicial discretion is one of balancing the interests of the parties as indicated in the House of Lords decision in *American Cyanamid* v. *Ethicon Ltd.*[61] and the Canadian jurisprudence following therefrom.[62]

(d) The Court's Power to Appoint a Receiver and Other Procedural Rules for the Interim Preservation of Property

Section 114 of the *Courts of Justice Act, 1984* provides that a receiver may be appointed by interlocutory order where it is just and convenient to

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[55] R. Meagher, W. Gummow, T. Lehane, *Equity, Doctrines and Remedies* (1975), at 415-416, 475.

[56] See *Burr* v. *Bloomburg* (1927), 138 A. 876; Meagher, Gummow, Lehane, *supra*, note 55, ch.22.

[57] *Carter* v. *Long*, *supra*, note 27, where specific relief was thought to be an appropriate remedy, although a replevin order was upheld.

[58] *Doulton Potteries* v. *Bronotte*, [1971] 1 N.S.W.L.R. 591.

[59] *North* v. *Great Northern Railway Co.* (1860), 2 Giff. 64, 66 E.R. 28.

[60] *Sky Petroleum Ltd.* v. *V.I.P. Petroleum Ltd.*, [1974] 1 W.L.R. 576 (Ch.).

[61] [1975] A.C. 396 (H.L.).

[62] See: R.G. Hammond, "Interlocutory Injunctions: Time for New Model" (1980) 30 U. of T. L.J. 240; P. Lamek, "Equitable Remedies", in *Special Lectures, Law Society of Upper Canada* (1981), at 125-141; P. Carlson, "Granting an Interlocutory Injunction: What is the Test?" (1982) 12 Man. L.J. 109; R. Sharpe, *Injunctions and Specific Performance* (1983), at 59-89.

do so and terms may be imposed where appropriate.[63] Receivers have been appointed in fact situations involving a claim for possession of personal property and the order may be made without notice to the defendant.[64] This power of the court is exercised not as a matter of right but only in special circumstances where there is a demonstrated need to preserve the property.[65]

Rule of Civil Procedure 45.01(1) provides:

> The court may make an interim order for the custody or preservation of any property in question in a proceeding or relevant to an issue in a proceeding, and for that purpose may authorize entry on or into any property in the possession of a party or of a person not a party.

It appears that the power granted to the court under rule 45.01 and similar rules in other jurisdictions[66] is designed to ensure the preservation of the rights of the parties in the property pending the ultimate outcome of the litigation.[67] The discretion exercised by the court under such rules would appear to be similar to the discretion exercised when granting an interlocutory injunction, at least to the extent that the plaintiff is required to meet threshold proof requirements. In addition, the balance of convenience between the parties and the conduct of the parties will be considered.[68]

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[63] Ontario Rule of Civil Procedure 41 gives procedural directions for the exercise of the power.

[64] *Taylor* v. *Eckersley* (1876), 2 Ch. D. 302, where the plaintiff was appointed receiver of the defendant's furniture upon undertaking to abide by any order of the court as to damages; *Kay* v. *Ratz* (1918), 44 D.L.R. 145 (Alta.), where replevin was probably not available because the plaintiff was not entitled to immediate possession (the time of delivery under the contract of sale not having arrived), the sheriff was appointed receiver upon the plaintiff giving an undertaking as to damages; *Bardeau* v. *Crown Food Service Equipment Ltd.* (1982), 36 O.R. (2d) 355.

[65] *Kerr on Receivers*, 14th ed., R. Walton ed. (1972), at 6-7; *Goldex Mines Ltd.* v. *Revill* (1975), 7 O.R. (2d) 216 (C.A.), at 219-220; *Kay* v. *Ratz*, *supra*, note 64; *Taylor* v. *Eckersley*, *supra*, note 64.

[66] Rules of the Supreme Court (1988) (U.K.), O. 29, rr.2, 3, 6; Nova Scotia, rr. 43.02, 43.05; New Brunswick, rr.35.02, 35.04; Manitoba, rr.328, 330(1), 331; Saskatchewan, rr.390, 392; Alberta, rr.467, 469; British Columbia, r.46.

[67] In *Polini* v. *Gray* (1879), 12 Ch. D. 438 (C.A.), at 443, Jessel M.R. said:

> The principle which underlies all orders for the preservation of property pending litigation is this, that the successful party in the litigation, that is, the ultimately successful party, is to reap the fruits of that litigation and not obtain merely a barren success.

See also *Carl B. Potter Ltd.* v. *Anil Canada Ltd.* (1976), 65 D.L.R. (3d) 758 (N.S. S.C. T.D.), dealing with Nova Scotia rule 43.02(3).

[68] In *Bardeau Ltd.* v. *Crown Food Service Equipment Ltd.*, *supra*, note 64 (order dissolved, (1982), 38 O.R. (2d) 411, on the grounds that the applicant had not disclosed all the material facts on the *ex parte* application), Steele J. granted an *ex parte* order and

Further, pursuant to the predecessor of rule 45.01, and the inherent power of the court, an *ex parte* order has been made requiring the defendants to disclose the location of the goods and documents which either formed the subject matter of the action or were of evidentiary value.[69]

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indicated that the order was granted pursuant to rule 372 and the inherent power of the court. Although the judge indicated that the principles governing the granting of an interim injunction had no application to the motion, he indicated that the principles which did apply were that the plaintiff must show an extremely strong *prima facie* case and that there is a serious concern that the evidence would be destroyed if the order were not made. He also indicated a keen regard for the high handed conduct of the defendant. See also: *Société Pour L'Administration du Droit de Reproduction Mécanique des Auteurs* v. *Trans World Record Corp.* (1977), 17 N.R. 162; *Carl B. Potter* v. *Anil Canada Ltd.*, *supra*, note 67.

[69] See former rule 372 and *Bardeau Ltd.* v. *Crown Food*, *supra*, note 64. *Morgan* v. *Fakete* (1980), 25 O.R. (2d) 237 (Ont. M. Ch.); *Nintendo of America Inc.* v. *Coinex Video Games Inc.* (1983), 34 C.P.C. 108 (Fed. C.A.).

CHAPTER 7

THE BALANCE BETWEEN SPECIFIC RELIEF AND DAMAGES

1. INTRODUCTION

As indicated in chapter 6, at common law and in equity the remedy of recovery *in specie* is available only on a discretionary basis for goods which can be shown to have some form of uniqueness, either commercial or personal. The onus of showing the uniqueness of the goods is on the person seeking recovery *in specie*. It was only in the statutory remedy of replevin and similar rules of civil procedure that there developed a vindicatory right to an order for recovery *in specie*. In the contractual context scholars differ on the desirability and economic efficiency of decrees of specific performance and it is trite to say that each case is dependent on its own facts. It is arguable that modern courts are showing a greater readiness to grant equitable specific relief in commercial cases. Specific performance in the sale of goods context was the subject of attention in the Ontario Law Reform Commission's *Report on Sale of Goods*.[1] The thrust of the reform recommended in that Report is to dethrone damages as the presumptive remedy and move to a more non-hierarchical, context-dependent approach to the availability of specific performance. This direction responds to the suspicion that the historical denial of specific performance, which is based on the grounds that in most commercial cases damages are presumed to be an adequate remedy, in fact places a significant risk of undercompensation on the plaintiff.[2] In addition, the Report recommended the abolition of the requirement of the present *Sale of Goods Act*[3] that the goods be specific or ascertained before the remedy of specific performance is available.[4]

No one seriously advocates swinging the pendulum to the opposite extreme and making recovery *in specie* the presumptive remedy to the same extent that damages is, or was, the presumptive remedy at common law and in equity. However, we do contemplate a regime of remedies for wrongful

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[1] *Report on Sale of Goods* (1979), Vol. II, at 436-444.

[2] See A. Schwartz, "The Case for Specific Performance"(1979) 89 Yale L. J. 271.

[3] R.S.O.1980, c. 426.

[4] *Report on Sale of Goods*, *supra*, note 1, at 443, and Vol. III, Draft Act, s. 9.18.

interference with goods by which it may be said that the traditional imbalance between specific relief and damages will be redressed. Whatever may be said for specific relief in the contractual context, we favour the development of a remedial structure which will more adequately vindicate property rights. In this chapter we consider the deficiencies of the present balance between the damages remedy and an order for recovery of possession and recommend a *prima facie* right of recovery *in specie* both at the final and the interlocutory stage. In fact, we propose to expand the availability of recovery *in specie* to situations where the claimant has suffered a wrongful interference with goods but is not entitled to immediate possession of the goods. However, we do not suggest that specific relief should be granted as a matter of course. Rather, we envisage a regime where a remedy of recovery of possession to vindicate a property right is to be granted unless the court is satisfied that some other disposition is more appropriate. We would put the burden of showing that another disposition is more appropriate on the defendant who is resisting the order. We believe that this recommended position would leave the court ample scope to consider and weigh all relevant factors of the specific case. It could be argued that we are recommending no more than what many courts are doing at present. If that is so then we are content to put the position beyond doubt.

2. A *PRIMA FACIE* RIGHT TO RECOVERY

(a) The Plaintiff's Case

(i) Where Plaintiff has the Right to Immediate Possession

In our opinion, the balance between specific relief and damages should not be dependent upon historical presumptions. Rather, it should be based on an appropriate choice of remedies in view of all the facts of the particular case. In addition, the burden of showing that damages is an inadequate remedy should not be placed on the plaintiff who is, after all, seeking to vindicate a property right. A defendant who is, *ex hypothesi*, wrongfully detaining property to which the plaintiff has a superior right to possession should more logically bear the burden of proving what he asserts, that is, that specific relief is not an appropriate remedy. The concept of property is usually conceived of as the right to exclude others from the enjoyment of the object.[5] It follows that one with a superior right to possession should be able to recover the subject property from a wrongful detainer. For various historical reasons the owner of goods was never accorded even a *prima facie* right to recover possession of the goods. Such a *lacuna* in the remedial pattern is not appropriate in a society in which goods have become such an important part of the wealth of individuals. We consider this to be a deficiency in the existing law and we opine that a successful party to an

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[5] See Cohen, "Dialogue on Private Property" (1954-55) 9 Rutgers L. Rev. 35.

action who has claimed recovery *in specie* should be entitled at his option to an order for the recovery of the subject goods.

(ii) Where Plaintiff does not have the Right to Immediate Possession

We have already seen that at least some of the property torts now appear to include protection, not only of general and special common law property rights, but also of equitable interests and mere personal rights. It may be that other interests in or in respect of property will in future be protected by the property torts or related torts. Under present law, as we saw, recovery *in specie*, while not restricted to common law rights to immediate possession, is not available to someone who cannot show some sort of right to immediate possession.

We considered, and are attracted to, a recommendation to the effect that any interest sufficient to support an action for wrongful interference with goods should be sufficient for recovery *in specie*, and for our proposed presumptive right of recovery. This position is in line with our recommendation concerning the *jus tertii* and recovery of value of the goods in chapter 12. This would confirm the possibility of recovery *in specie*, for example, for a buyer with a mere contractual right to possession, and, further, open up the possibility of a buyer with no right to possession at all, obtaining the goods. This would go further than the Ontario Law Reform Commission was prepared to go in the *Report on Sale of Goods* in relation to the remedy of specific performance.[6] It would also open up the possibility of claims on goods in bankruptcy which cannot now be maintained. Further, it raises the procedural problem of how to deal with a claim by a defendant that possession should not be given to a plaintiff who lacks the right to immediate possession, but rather to a third party who has that right.

We believe that a court *should* have the flexibility to order recovery *in specie* in *all* wrongful interference actions where recovery *in specie* is claimed. And, where wrongful interference is established and recovery *in specie* claimed, we believe that the defendant should have the onus of showing sufficient reasons not to grant it. However, the nature of the plaintiff's interest in the goods should be relevant to the court's determination of the issue concerning recovery *in specie*. In a sale contract situation, where no property has passed, the court should, for example, be able to take account of whether the price or a substantial portion thereof has been paid. In a bankruptcy situation, this would be a particularly cogent consideration.

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[6] *Report on Sale of Goods*, *supra*, note 1, Vol. II, at 436–44, and see Alberta Institute of Law Research and Reform, *Report No. 38 The Uniform Sale of Goods Act* (1982), s. 9.20, which retains the general discretion, but adds, *inter alia*, a discretion to take into account whether special property had passed to the buyer, and whether he had paid all or part of the purchase price.

The procedural problem of a third party with the right to immediate possession should be dealt with as we propose below, in our discussion of the *jus tertii*, for recovery of damages by someone with a limited interest as if he were owner. Recovery *in specie* should not be allowed if the relevant third party objects to a plaintiff without a right to immediate possession recovering on his behalf.[7] If the third party does not object, the court should not deny the plaintiff recovery *in specie* simply because of the third party's existence. However, if a plaintiff without a right to immediate possession does recover possession, he should be deemed to hold the goods in trust for the benefit of all those entitled. Something of this sort is a feature of present law: where a bailee recovers the value of the goods, as in a conversion action, he holds any excess over the value of his interest for the account of the bailor. This would subject the successful plaintiff to the duties of a bare trustee. This does not seem to us to be inappropriate, as the plaintiff always has the alternative of recovering the value of his interest in damages under our proposal in that regard below.

(b) The Defence of Demonstrating the Appropriateness of an Alternative Disposition to Recovery *in Specie*

However, it must be acknowledged that there may be very legitimate reasons why in a particular case an order for recovery should not be made. In some, perhaps many, cases of wrongful interference with goods an order for specific relief might not be appropriate. For instance, specific relief might not be appropriate in situations where the defendant has physically affixed the goods to his premises, or has integrated the goods into his business, or has combined the goods with goods of his own, or otherwise altered the goods. Again, specific relief might be unfair and therefore inappropriate in cases where the plaintiff has been guilty of contributory negligence, or has failed to go in a timely and reasonable manner into the market for substitute goods, or has a limited, monetary interest, like that of a lien holder or secured party. In addition, it might be unfair to creditors or others of the defendant to order specific relief in cases where the order would amount to specific performance of a contract and result in the plaintiff obtaining an advantage over the creditors or claimants of an insolvent defendant.[8] Each fact situation will exhibit many nuances which will legitimately weigh upon an appropriate choice between specific relief and damages.

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[7] We note in this regard that all jurisdictions have procedural provisions similar to Ontario Rule of Civil Procedure 5.03 which allows a broad power of joinder of parties.

[8] The impact of a seller's insolvency is by no means established. In *Anders Redert* v. *Louisa Stevedoring Co.*, [1985] 2 All E.R. 669, at 674 (Ch.D.), Goulding J. said: "Commercial life would be subjected to new and unjust hazards if the court were to decree specific performance of contracts usually sounding only in damages simply because of a party's insolvency". Compare *Eximineco Handels A.G.* v. *Partrederiet Oro Chief and Levantes Maritime Corporation*, [1983] 2 Lloyd's Rep. 509, at 521 (Q.B.D., Commercial Court). See also M.G. Bridge, *Sale of Goods* (1988), at 149; A.Dadson, "A Fresh Plea for the Financing Buyer" (1985-86) 11 C.B.L.J. 171.

Our solution is an attempt to strike a better and more responsive balance of remedies whereby the court is invited to make an appropriate choice of remedies in light of the facts of the particular case. In line with our thinking in terms of a *prima facie* right to recovery *in specie*, we think it appropriate that the onus be placed on the party resisting an order for recovery to demonstrate that some other disposition would be more appropriate. In subsection 13(2) of our Draft Act we direct the court's attention to appropriate factors which bear on the discretion to order some other disposition.

We note that neither the *Eighteenth Report* nor the *Torts (Interference With Goods) Act 1977* addressed the question of changes in the balance between the damages remedy and recovery *in specie*. Implicit in the Report is the assumption that the present state of the law concerning this issue is satisfactory. Thus, section 3 of the *Act* provides that the court has the option of ordering delivery of the goods without any further indication of when such an order would be appropriate. *Clerk & Lindsell on Torts*[9] cite, *inter alia*, *Whiteley v. Hilt*[10] in support of the proposition that such an order will not "usually be made in respect of ordinary articles of commerce having no special value either intrinsically or for the plaintiff and for which damages would provide adequate compensation". We acknowledge that courts at present do have the authority to tailor the appropriate remedy to the justice of the particular case. Insofar as a court is prepared to order the appropriate remedy free from the historical presumption in favour of the damages remedy it may well be that a statement of the options open to the court is sufficient. However, we prefer to rearticulate the relationship between specific relief and damages in terms which will be more clearly vindicatory of property rights. That is, we favour granting specific relief unless there is a sufficient reason to order otherwise. We acknowledge that one might be hard pressed to construct a fact situation in which, after all the factors are weighed by the court, the *Torts (Interference with Goods) Act 1977* would dictate a different result from the approach which we favour.

3. RECOVERY *IN SPECIE* AT THE INTERLOCUTORY STAGE

(a) Introduction

As indicated in chapter 6,[11] section 117 of the *Courts of Justice Act, 1984* and Ontario Rule of Civil Procedure 44 provide specific power in the court to order the interim recovery of personal property. The power contained in

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[9] 15th ed. (1982), at 1068.

[10] [1918] 2 K.B. 808; and see *supra*, ch. 6.

[11] Replevin.

Rule of Civil Procedure 44.03[12] and section 117[13] is not in terms premised on the existence of a danger to the property or the demonstration of a need for interim preservation of the property as Rule 45.01[14] appears to be. It was also pointed out that the *Replevin Act*[15] and former Ontario rules 359-365[16] did provide a remedy for the recovery of goods *in specie* upon the plaintiff showing a *prima facie* case of entitlement to immediate possession. Although section 117 of the *Courts of Justice Act, 1984* and Rule of Civil Procedure 44 were apparently passed as a replacement for the *Replevin Act* and former rules 359-365, it is not absolutely clear that the *prima facie* entitlement to recovery *in specie* is retained.[17] It may be arguable that Rule of Civil Procedure 44 should not be regarded as a recasting of the replevin remedy because Rule of Civil Procedure 44.03 calls for the interposition of the court's discretion. Thus it might appear that the court could refuse an order under Rule of Civil Procedure 44 even though the plaintiff had shown a *prima facie* entitlement to immediate possession. For instance, the court might refuse to order interim recovery because the balance of convenience favoured the defendant. It is arguable that 44.03(1)(c) authorizes the court to do this even without the necessity of requiring security from the defendant. If such discretion is open to the court then it would appear that the rule adds very little to section 114 of the *Courts of Justice Act, 1984* where the court is given power to grant, *inter alia*, mandatory orders, and to include such terms as are considered just. The uncertainty here should be removed.

The English Law Reform Committee, in its *Eighteenth Report (Conversion and Detinue)* recommended that the provisions contained in section 45 of the *Judicature Act 1925* and R.S.C., Order 29, should be supplemented by a specific provision which would enable the court to order, by way of

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[12] The text of Rule of Civil Procedure 44.03 is reproduced *infra* this chapter, Undertakings as to Damages and Bonds.

[13]

> 117.—(1) In an action in which the recovery of possession of personal property is claimed and it is alleged that the property,
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> (a) was unlawfully taken from the possession of the plaintiff; or
>
> (b) is unlawfully detained by the defendant,
>
> the court, on motion, may make an interim order for recovery of possession of the property.
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> (2) A person who obtains possession of personal property by obtaining or setting aside an interim order under subsection (1) is liable for any loss suffered by the person ultimately found to be entitled to possession of the property.

[14] The text of Rule of Civil Procedure 45.01 is reproduced *supra*, ch. 6, The Court's Power to Appoint a Receiver and Other Procedural Rules for the Interim Preservation of Property.

[15] R.S.O. 1980, c.449 (repealed by *Courts of Justice Act, 1984*, S.O. 1984, c.11, s.210).

[16] Repealed by *The Courts of Justice Act, 1984*, s. 187.

[17] See *supra*, ch. 6.

interlocutory relief, the delivery up of any chattel the subject of an action for wrongful interference upon such terms as may be just.[18] This recommendation is carried into effect by Supreme Court Practice 1985, 29/2/-3/5 and C.C.R. 1981, Ord. 13, r. 7. The Law Reform Committee opined that such an amendment would pave the way for the abolition of replevin, and provide an expeditious judicial remedy which would justify stricter limits on the recaption remedy.[19] It appears that the claimant must show a *prima facie* case and that the jurisdiction to grant such orders is unfettered in that they can be granted even where the facts exhibit no imminent peril of destruction of the property.[20]

We agree with the direction and reasons of the Law Reform Committee. However, we have chosen to achieve the reform in a different manner. We have sought to accomplish an expeditious interlocutory judicial remedy by giving a *prima facie* right to recovery *in specie*. In this we have taken guidance from the replevin remedy as it developed in Canada and in the United States. In addition, we favour a rule of practice which will offer the court some guidance concerning the factors to be considered in exercising its discretion.

(b) The Plaintiff's Case

Two examples will serve to illustrate this point:

(a) The plaintiff owns a 1957 Thunderbird which he left at the defendant's premises. The plaintiff now wishes to recover the automobile but the defendant refuses to deliver it until other unrelated claims are settled.

(b) The plaintiff is a secured creditor and the defendant is in default under the security agreement under which he has possession of the goods (equipment). The plaintiff applies for interlocutory recovery of the goods and the defendant resists on the grounds that he will be able to pay the amount owing to the plaintiff if he can retain and use the goods for a further period of time.

Concerning example (a), it seems reasonably clear that under the repealed *Replevin Act* as well as Rule of Civil Procedure 44, no matter how it is interpreted, an order for interim recovery would be made. However, in the case of example (b), the result is not so clear. Under the *Replevin Act* it was clear that the plaintiff would recover the goods unless the defendant posted

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[18] Cmnd. 4774 (1971), para. 97.

[19] *Ibid.*

[20] *Clerk & Lindsell On Torts*, 15th. ed., *supra*, note 8, para. 21-87, text accompanying, n. 56; and see *Adventure Films* v. *Tully*, The Times, Oct. 14, 1982.

appropriate security.[21] However, if the application were for a mandatory order under section 114 of the *Courts of Justice Act, 1984* (or Rule of Civil Procedure 44 if it were to be interpreted as being governed by similar considerations), it could well be that the plaintiff would not succeed in recovering possession whether or not the defendant put up security or gave an undertaking as to damages. On the other hand, Rule of Civil Procedure 44 could be interpreted as giving the plaintiff, upon him showing a *prima facie* case of entitlement, a *prima facie* right to interim recovery—unless the defendant could demonstrate that some other disposition is more appropriate. Such an interpretation is more in line with the law as it developed under the *Replevin Act*, and it is more consistent with our thinking concerning the *prima facie* right to entitlement after a final disposition of the issues in dispute. We recommend that the uncertainty be resolved in favour of a statutory provision which clearly sets out a plaintiff's right to interim recovery of goods upon showing a *prima facie* case, unless the court is satisfied that some other disposition is more appropriate.[22]

(c) Court's Discretion to Order Otherwise

As indicated above, Rule of Civil Procedure 44 may be read to interpose a judicial discretion between the plaintiff's showing of a *prima facie* case and the granting of the order for interim recovery. As indicated, we argue for a *prima facie* right to interim recovery upon the plaintiff showing a *prima facie* case. However, the court should retain the discretion to refuse to order interim recovery. Should a rule of civil procedure give a court some direction concerning the factors to be addressed when exercising the discretion?

Based upon historical equitable considerations, one can expect discretionary factors to include: the nature of the goods (are they of special value to the plaintiff?), the strength of the plaintiff's case, whether or not the plaintiff will suffer injury which cannot adequately be compensated in damages, the balance of convenience, the conduct of the parties, and the security to be given by the party gaining or retaining possession. We think that these considerations are appropriate and that an exhaustive list would not be possible. However, on balance we favour a rule which specifically articulates the existence of the court's discretion along with some direction as to the types of factors to be considered in exercising the discretion.[23] One of the reasons for favouring this change is that we have recommended above the expansion of the availability of the remedy of recovery *in specie* to a plaintiff who may not be entitled to immediate possession of the goods, for

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[21] See *Midland-Ross of Canada Limited* v. *Bachan Aerospace of Canada Limited and the Toronto Dominion Bank* (1983), 3 P.P.S.A.C. 21 (Ont.M.Ch.); affirmed on appeal to Hollingworth J. (Aug. 5, 1983); leave to appeal to Divisional Court denied (Oct. 3, 1983).

[22] See s. 14(1) of our Draft Act.

[23] See s. 14(2) of our Draft Act.

example, a bailor, a reversioner, or a beneficiary. In such cases a relevant consideration will include the nature of the plaintiff's interest in the goods.

(d) Subsequent Failure in the Main Action by the Party Obtaining Possession of Goods

At common law the sheriff was required to take pledges from the claimant in a replevin action. The pledge served to require the plaintiff to prosecute the action and by the *Statute of Westminster II* the requirement was added that the plaintiff should return the goods to the defendant if the court should so order. By statute of 2 Geo. II bonds were substituted.[24]

Section 117(2) of the *Courts of Justice Act, 1984* provides:

> A person who obtains possession of personal property by obtaining or setting aside an interim order under subsection (1) is liable for any loss suffered by the person ultimately found to be entitled to possession of the property.

We agree with the terms of section 117(2) insofar as it establishes a mutual risk of liability. We note, however, that the terms of the section seem to establish a general liability to anyone who is ultimately found to be entitled to possession whether or not that person is a party to the action at the time the order is made. Later we deal with the defence of the *jus tertii*[25] and we there recommend that a person against whom a claim is made in an action for wrongful interference with goods should always be allowed to plead that an identified other person has a better right or title than the claimant. This recommendation would allow the possibility of a claimant obtaining an order for interim recovery *in specie* but being unsuccessful at trial because a *tertius* was joined after the interim order was granted and was awarded possession of the goods at the trial.

In addition, section 117(2) does not in terms condition liability on lack of success in the action. It is true that Rule of Civil Procedure 44.04(1) and

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[24] Under the *Replevin Act*, *supra*, note 15, the required form of bond was conditioned upon:

(a) prosecution of the action with effect and without delay;

(b) return of the property to the defendant if return shall be adjudged;

(c) pay such damages as the defendant shall sustain by issue of the order of replevin if the said plaintiff fails to recover judgment;

(d) observe, keep and perform all rules and orders made by the court in the said action;

(e) in the case of mere wrongful detainer by the defendant (where conversion would lie) indemnify and save harmless the defendant from all losses and damages sustained by reason of the seizure including deterioration of the goods and all costs and expenses.

[25] *Infra*, ch. 12.

Form 44A indicate that liability on bonds and other security ordered pursuant to the Rule is conditioned upon failure to return the goods without delay when ordered to do so and failure to pay damages and costs that the identified opposite party has sustained by reason of the interim order. However, a finding of entitlement, in itself, does not necessarily equate to success in the action which should always establish liability of the party who obtained possession by interim order. For instance, a plaintiff might obtain possession at the interlocutory stage because the defendant does not contest the application or, contesting, does not succeed in convincing the court that the plaintiff should be denied possession. Circumstances may have changed by the time the trial is held and the court might award the plaintiff damages in lieu of recovery *in specie*. Or, the court might award possession to a *tertius* added as a party after the interim order was made. In either case it is not at all clear that the plaintiff should automatically incur liability to the person who was awarded possession after the trial. In the first case it cannot be said that the plaintiff was unsuccessful and, in the case of the *tertius*, the plaintiff may be identified in interest with the *tertius* and liability would be inappropriate.

We believe that the wording of section 117(2) should be amended and clarified to overcome the abovementioned difficulties. We are attracted by the flexible and discretionary nature of Ontario Rule of Civil Procedure 40.03, which reads:

> On a motion for an interlocutory injunction or mandatory order, the moving party shall, unless the court orders otherwise, undertake to abide by any order concerning damages that the court may make if it ultimately appears that the granting of the order has caused damage to the responding party for which the moving party ought to compensate the responding party.

We believe that the wording of section 117(2) should be amended along the lines of Rule of Civil Procedure 40.03 to condition liability on a finding of the court that damage has been caused for which the moving party should compensate. In considering such an order the court would be able to consider the degree of success which the moving party has achieved as well as the relationship of the moving party to the party finally awarded possession. In addition, the jurisprudence governing inquiries as to damages pursuant to undertakings in interlocutory injunction cases would be appropriately relevant to the court's discretion under an amended section 117(2).[26]

(e) Undertakings as to Damages and Bonds

As indicated above, from earliest times in replevin proceedings, the

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[26] See, for instance: *Attorney General for Ontario* v. *Harry et al.*(1982), 41 C.P.C. 67 (Ont. H.C.); Note, "Recovery For Wrongful Interlocutory Injunctions Under Rule 65(c)" (1986) 99 Harv. L. Rev. 829, at 842.

plaintiff was required to enter into a bond. The purpose of the bond was to secure a possible damages claim by the party from whom the property was replevied. Ontario Rule of Civil Procedure 44.03 reads as follows:

> (1) On a motion for an interim order for recovery of possession of personal property made on notice to the defendant, the court may,
>
> (a) order the plaintiff to pay into court as security twice the value of the property as stated in the order, or such other amount as the court directs, or to give the appropriate sheriff security in such form and amount as the court approves, and direct the sheriff to take the property from the defendant and give it to the plaintiff;
>
> (b) order the defendant to pay into court as security twice the value of the property as stated in the order, or such other amount as the court directs, or to give the plaintiff security in such form and amount as the court approves, and direct that the property remain in the possession of the defendant; or
>
> (c) make such other order as is just.
>
> (2) On a motion for an interim order for the recovery of possession of personal property made without notice to the defendant, the court may,
>
> (a) order the plaintiff to pay into court as security twice the value of the property as stated in the order, or such other amount as the court directs, or to give the appropriate sheriff security in such form and amount as the court approves, and direct the sheriff to take and detain the property for a period of ten days after service of the interim order on the defendant before giving it to the plaintiff;
>
> (b) make such other order as is just.

The terms of Rule of Civil Procedure 44.03 clearly exhibit its ancestry in the *Replevin Act* and former Ontario rule 362.[27] It is interesting to compare Rule 44.03 with the security requirements in proceedings for mandatory orders. Rule of Civil Procedure 40.03 reads:

> On a motion for an interlocutory injunction or mandatory order, the moving party shall, unless the court orders otherwise, undertake to abide by any order concerning damages that the court may make if it ultimately appears that the granting of the order has caused damage to the responding party for which the moving party ought to compensate the responding party.

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[27] Rule 362:

> (1) Before the sheriff acts on the order, he shall take a bond (Form 139) from the plaintiff with two sufficient sureties in such sum as is prescribed by the order, or, if no special provision has been made, then in treble the value of the property as stated in the order of replevin.
>
> (2) The plaintiff may, instead of giving a bond, pay into court twice the value of the goods as stated in the order, and the sheriff may act upon a certificate of the Accountant that the money has been paid.

Assuming that Rule of Civil Procedure 44.03(1)(c) would not be read *ejusdem generis* with the rest of 44.03(1), we acknowledge that the court would have the power under 44.03(1) to grant an order for interim recovery upon the plaintiff giving an undertaking as to damages. However, it seems to us that the wording of 44.03(1) displays a bias in favour of some sort of security other than an undertaking. Indeed, a plaintiff who might have difficulty obtaining a bond or paying some multiple of the value of the property into court might be well advised to attempt to obtain a mandatory order under 40.03 where the wording requires only an undertaking as to damages unless otherwise ordered. We do not see any merit in the difference between 44.03(1) and 40.03. We recommend that 44.03 be amended to reflect the same degree of acceptability of undertakings as to damages.

4. POWERS OF THE SHERIFF WHEN SEIZING GOODS PURSUANT TO AN ORDER OF THE COURT

Sections 4, 5, and 6 of the *Replevin Act* gave the sheriff very great powers of enforcement of replevin orders, including the power to break into dwelling houses and search persons. Rule of Civil Procedure 44.07(3) provides that where the sheriff is unable to comply with the order for interim recovery of personal property, or it is dangerous to do so, the sheriff may move for directions from the court. Rule of Civil Procedure 60.17 allows the sheriff or any interested person to move for directions where a question arises in relation to the measures to be taken in carrying out an order.

The Ontario Law Reform Commission, in its 1981 *Report on the Enforcement of Judgment Debts and Related Matters*,[28] indicated the need for clarification of the closely related subject of the use of force by the sheriff when executing process for the realization of judgment debts. The Ontario Law Reform Commission made recommendations concerning the use of force by the sheriff in that context.[29] We are of the view that the law concerning the use of force by the sheriff in the execution of orders for the recovery of goods should be governed by the same provisions as the use of force by the sheriff in the execution of process for the realization of judgment debts.

As a corollary to the sheriff's use of force, the Ontario Law Reform Commission in its *Report on the Enforcement of Judgment Debts and Related Matters* considered the need for the sheriff to serve notice of seized property on interested people.[30] It was there recommended, among other things, that subsequent to a seizure, the sheriff should be required to serve a notice of seized property on all persons who, to his knowledge or reasonable belief may have some right, title, or interest in the seized property. The

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[28] Part II, at 110-112.

[29] Part II, at 300-301.

[30] Part II, at 260-261.

notice recommended in the *Report on the Enforcement of Judgment Debts and Related Matters* was couched in terms relating to the enforcement of a final judgment debt. However, the reasoning behind the need for such a notice is persuasive in the context of the seizure by the sheriff of goods pursuant to an order for interim recovery.

Ontario Rule of Civil Procedure 44.07(2) provides:

> The sheriff shall serve the order on the defendant when the property or any part of it is recovered or as soon thereafter as is possible.

We recommend that the sheriff should be directed to serve a copy of the order on the defendant and any person who to the sheriff's knowledge or reasonable belief claims an interest in the goods. Such service should take place at the time of seizure or so soon thereafter as is reasonable. The sheriff's knowledge of such interested persons would arise out of the documentation of the action as well as a search of public registers by the plaintiff at the sheriff's request. Later we recommend that a plaintiff who is relying on having been in possession of goods before a wrongful taking or who relies on a right to immediate possession must indicate in the pleadings the chain of title by virtue of which he had possession or claims a right to immediate possession.[31] Such details will provide information to the sheriff concerning persons interested in the goods.

5. DETERMINING THE LOCATION OF GOODS WHICH ARE THE SUBJECT OF AN ORDER FOR RECOVERY *IN SPECIE*

One of the practical and chronic problems in any proceeding where the sheriff is ordered to take possession of goods is the defendant's propensity to hide or otherwise make it difficult for the sheriff to find the goods. In fact, it appeared from discussions with sheriffs that the threat of the very great powers of search and entry given to sheriffs under the *Replevin Act* was the most effective method of actually gaining possession of the goods. Of course, the *Replevin Act* has now been repealed by the *Courts of Justice Act, 1984*, and we have recommended above that sheriffs be given no more power to enforce orders for recovery of goods than was recommended by the Ontario Law Reform Commission in the *Report on the Enforcement of Judgment Debts and Related Matters* for the enforcement of money judgments. Although Rule of Civil Procedure 44.07(3) provides that the sheriff may apply to the court for directions where he is unable to comply with the order, there is no clear authority for the court to order the defendant or any other person to disclose under oath the location of the goods. While it is arguable

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[31] See *infra*, ch. 12.

that the court would have such power within its inherent jurisdiction,[32] it would seem advisable to make the power clear.

It appears that there are two methods by which to clarify the court's power in the enforcement of Rule of Civil Procedure 44. One method would be to amend it to include a provision similar to Rule of Civil Procedure 60.18(2) and (6):

> (6) Where any difficulty arises concerning the enforcement of an order, the court may,
>
> (a) make an order for the examination of any person who the court is satisfied may have knowledge of the matters set out in subrule (2); and
>
> (b) make such order for the examination of any other person as is just.[33]

Another possibility already exists under the Rules of Civil Procedure, but is not expressly mentioned in Rule of Civil Procedure 44: in addition to an order under 44 (to the effect that the sheriff take possession of the goods and deliver them to the plaintiff) the court could also make a mandatory order under section 114 of the *Courts of Justice Act, 1984* to the effect that a party deliver up the subject goods to the sheriff. The result of ordering a party to deliver up the goods would be to allow the sheriff to issue a writ of delivery under Rule of Civil Procedure 60.04(1). Under 60.18(1)(a) the sheriff would then be a "creditor" and entitled to use the provisions of 60.18(2) and (6) to apply to the court for an order for the examination of the defendant ("debtor") or any other person.

In summary, we recommend that the power of the court to order the examination of the defendant or any other person be made clear in cases where the sheriff is ordered to take possession of goods. Perhaps the easiest method is to amend Rule of Civil Procedure 44 to give the court explicit power to order a party to deliver up the goods to the sheriff. In this way all the coercive effect of contempt proceedings as well as the provisions of 60.18(6) would be available to the sheriff and the successful party.

6. A DEFICIENCY IN THE *LANDLORD AND TENANT ACT*

A residential tenant whose goods have been wrongfully distrained is an individual to whom an efficient remedy for recovery *in specie* is unavailable. Although section 86 of the *Landlord and Tenant Act*[34] prohibits such

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[32] See, for example, *Bardeau Ltd.* v. *Crown Food Service Equipment Ltd.* (1982), 36 O.R. (2d) 355; and, in the context of a *Mareva* injunction, *Bekhor Ltd.* v. *Bilton*, [1981] 2 W.L.R. 601 (C.A.).

[33] We assume that "order" in Rule of Civil Procedure 60.18(6) includes interlocutory orders.

[34] R.S.O. 1980, c.232.

distraint, there is no expeditious remedy available to the tenant within proceedings under Part IV of that *Act*. The problem was recognized and a remedy attempted in the *Residential Tenancies Act*,[35] section 63(13) of which provided:

> Where, on the application of the person claiming to be the owner of an item of personal property, the Commission determines that the landlord has wrongfully sold, disposed of or otherwise dealt with the item of personal property, the Commission may make an order:
>
> (a) requiring the landlord to compensate the owner for the wrongful sale, disposition, or dealing; or
>
> (b) requiring the landlord to give the property to the owner.

However, the Supreme Court of Canada in *Reference Re Residential Tenancies Act*[36] held the *Act* to be *ultra vires* the Province of Ontario. It is true to say that a tenant is entitled to use Rule of Civil Procedure 44 to bring a motion for the interim return of his goods. However, it would be procedurally more satisfactory to incorporate such a power into the summary procedure of Part IV of the *Landlord and Tenant Act*. Therefore, we recommend that Part IV of the *Landlord and Tenant Act* be amended to give a judge of the District Court power to hear a tenant's application for recovery *in specie* or the value of the goods from a landlord who has wrongfully interfered with them.

7. CLAIM AND DELIVERY—SOME AMERICAN EXPERIENCE

In some states, such as California and Michigan, proceedings for recovery of personal property are styled "claim and delivery". Prior to 1972 the California procedure was similar to replevin proceedings by *praecipe* in Ontario under the *Replevin Act* and former rule 359(b), in that there was no provision for a review by a judicial officer before the sheriff made the seizure. However, the sheriff retained possession for a period of time to allow exception to be taken to the sureties and the filing of third party claims. In 1971 the California Supreme Court in *Blair* v. *Pitches*[37] declared the claim and delivery statute to be in violation of the 4th, 5th and 14th amendments to the United States Constitution. This decision followed the 1969 decision of the Supreme Court of the United States in *Sniadach* v. *Family Finance Corp.*,[38] which dealt with prejudgment garnishment, and was followed in 1972 by the more famous *Fuentes* v. *Shevin*,[39] where the Court invalidated

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[35] R.S.O. 1980, c.452.

[36] [1981] 1 S.C.R. 714.

[37] 5 Cal. 3d. 258; 486 P. 2d. 1242.

[38] 395 U.S. 337 (1969).

[39] 407 U.S. 67 (1972).

similar replevin laws of Florida and Pennsylvania. *Fuentes* v. *Shevin* would require that a fair hearing be held before the goods are taken from the defendant. Such a hearing would be required except in circumstances of important governmental or general public interest, where prompt action is required and strict control has been kept over the state monopoly of legitimate force. In addition, the California Supreme Court in *Randome* v. *Appellate Department*[40] in 1971 held that prejudgment attachment of the debtor's necessaries of life could not be justified unless there was a hearing. The *Randome* case introduced the possibility that even in special circumstances such an *ex parte* attachment of necessaries of life would not be constitutionally valid. In 1972 the California claim and delivery statute was studied by the California Law Revision Commission and recommendations were made relating to its reform.[41] These recommendations now form part of the California *Code of Civil Procedure*.[42] The sections dealing with claim and delivery form a very extensive, detailed and comprehensive code of procedure. We take the *Code* to be a relevant product of recent studies and recommendations in the United States. We attempt only to note some significant differences from the past and present Ontario practice and relate these differences to our recommendations in this Study Paper.

The California *Code* establishes a *prima facie* right to a writ of possession where the plaintiff can show the probable validity of the claim[43] and the plaintiff provides the required undertakings with sureties in an amount not less than twice the value of the property.[44] However, the writ may only issue after a judicial hearing except in cases: (a) of felonious taking from the plaintiff but not including embezzlement, breach of trust, or obtaining possession by false or fraudulent representation; (b) where the property is a credit card; or (c) the defendant acquired possession of the property in the ordinary course of his trade or business for commercial purposes and the property is not necessary for the support of the defendant or his family and there is an immediate danger that the property will become unavailable to levy by reason of being transferred, concealed or removed from the state or will become substantially impaired in value by acts of destruction.

We note with approval the *prima facie* right to recovery at this interlocutory state. In addition, we note and agree that a motion for interim recovery should be made only upon notice to the defendant unless there is good reason to the contrary. However, we are not convinced that it is

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[40] 5 Cal. 3d. 536; 488 P. 2d. 13 (1971).

[41] California Law Revision Commission, *Recommendation Relating to The Claim and Delivery Statute* (Dec. 1972). The Michigan reaction is contained in *Administrative Orders of the Michigan Supreme Court*, 1973—3.

[42] Part 1, Title 7, chapter 2, ss. 511.010-516.030.

[43] "[P]robable validity" is defined in s. 511.090 to mean that it is more likely than not that the plaintiff will obtain a judgment against the defendant on the claim.

[44] S. 515.010.

possible or advisable to attempt to list instances which should attract a court's power to order interim recovery without notice to the defendant. This is particularly so in view of the familiarity of the judiciary and the legal profession with former rule 218[45] and present Rule of Civil Procedure 44.01(2) which provides:

> The Notice of Motion shall be served on the defendant unless the court is satisfied that there is reason to believe that the defendant may improperly attempt to prevent recovery of possession of the property or that, for any other sufficient reason, the order should be made without notice.

We believe that concerns about when an *ex parte* order for interim recovery may be made are adequately met by present Rule of Civil Procedure 44.01(2).

The California *Code* also contains detailed provisions concerning the manner in which a sheriff is to take possession of the goods.[46] The drafters appear to have been concerned with the sanctity of private dwelling houses and the prevention of serious bodily harm or death. We share these concerns. However, we believe that our recommendation to give the sheriff the same powers as when executing money judgments meets the concern.[47]

The California,[48] Michigan,[49] and New York[50] rules also contain fairly elaborate provisions concerning the power of parties or persons claiming an interest in the goods to take exception to the adequacy of the sureties provided. We note the terms of Ontario Rule of Civil Procedure 44.04(3),[51] the historical practice in the Province which left the sufficiency of sureties to the initial discretion of the court and, subsequently, to the court's power to vary the initial order, and the fact that we were not made aware of any problems in this area. We conclude that the present Ontario practice is sufficient in this regard.

The California *Code* is silent as to the form that an order should take after the final resolution of the dispute concerning possession of the personal property. However, we note that the New York *Civil Practice Law and*

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[45] If satisfied that the delay necessary to give notice of motion might entail serious mischief, the court may make an interim order *ex parte*.

[46] S. 514.010; and see also New York, *Civil Practice Law and Rules*, s. 7102.

[47] *Supra* this chapter.

[48] S. 515.030.

[49] *MCR* 3.604 (E) (F).

[50] Art. 25, ss. 2506-2509.

[51] Where the bond is to be given by a person other than a guarantee company to which the *Guarantee Companies Securities Act* applies, the person giving the bond shall first be approved by the court.

Rules provides some guidance to the court: a successful party who is in possession at the time of judgment is entitled to a judgment for possession; and a successful party who is not in possession is entitled to a judgment in the alternative of possession or value at the defendant's option. However, a successful defendant whose interest is in the nature of a security for money owed by the plaintiff is entitled only to a money judgment with an added right to have possession until the money judgment is paid.[52] We feel that such detailed provisions are unnecessary in Ontario in view of the very broad discretion which we recommend both at the interlocutory and final stage whereby a court may decline to order recovery *in specie*.

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[52] Art. 71, s. 7108.

CHAPTER 8

RECAPTION—THE EXTRAJUDICIAL REMEDY

1. INTRODUCTION

Recaption may be defined as the taking of possession of a chattel, without the assistance of the legal process, by a person having a right to immediate possession of that chattel superior to that held by the person from whom possession is taken. The term "recaptor" describes the person taking the goods. The term "recaptee" describes the person who is dispossessed by the remedy.

Because recaption takes place without the aid of the judicial process, it is not surprising that there is little judicial authority concerning recaption. The matter comes before the courts only when the recaptee complains that his rights have been infringed by the recaptor as a result of the recaptor's self-help. The recaptee's complaint will relate either to the fact that the goods have been taken from him, or to the method by which those goods were taken.

With respect to the bare fact that a recaptor has taken goods from the possession of a recaptee, the recaptee's rights are governed by the property torts alone. It is no defence to a property tort that the tortfeasor was purporting, honestly but wrongly, to exercise recaption rights. If the purported recaptor errs in assessing the superiority of his right to possession, he is civilly liable.[1] Where he is correct, of course, the bare fact that he has taken the goods will not give rise to liability. Given this, there has never been a need for the law to define when a person can use the recaption remedy.[2] It is

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[1] See for example, *Robertson* v. *Vivian and Vivian Gas Engine Works* (1934), 48 B.C.R. 295 (B.C.C.A.) where a conditional vendor was held liable in damages for a premature repossession. As Prosser has stated in a passage germane to Canadian law:

> One consequence, however, of the fact that the [recaptor] is...the aggressor, is that he is required to take his chances on being right...and the loss due to any mistake...must fall upon the one who makes it.

Prosser and Keeton on Torts, 5th ed., W. P. Keeton ed. (1984), at 138.

[2] Some efforts have been made, in the interests of fairness and maintenance of peace, to use recaption rules to limit the right of a person to retake goods when that person would

through the property torts that the law already indicates when a person can or cannot successfully establish the defence of recaption to an allegation of wrongful taking.[3] When we speak of the law of recaption, then, we are concerned with rules about the method of retaking employed during recaption. In particular, the rules of recaption confer certain rights on recaptors to commit some acts during the exercise of a recaption remedy that would otherwise be tortious as against the recaptee.

Broadly speaking, there are two categories of recaption rights sustained by law: those that are conferred by operation of law, and those conferred by the consent of the recaptee and recognized by law. Although of different historical pedigree, in Ontario these two types of cases have come to be subject to the same jurisprudence[4] and confer the same recaption rights.

The first category, recaption endorsed by the operation of law, is of ancient origin.[5] It initially conferred recaption rights only where chattels were taken from a thief after fresh pursuit.[6] This original right of recaption

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not be committing a property tort by the bare fact of retaking the goods. C.A. Branston, in his article "The Forcible Recaption of Chattels" (1912) 61 L.Q. Rev. 262, at 267, sought to confine the right to retake to cases where the recaptee does not have a "claim of right". *Miller* v. *Strohmeyer* (1887), 4 T.L.R. 133 supports that view; but it is contradicted by *Waller* v. *Danger* (1590), 3 Bulft 17; *Laicon* v. *Barnard* (1682), Hutton 81, 123 E.R. 15; *Blades* v. *Higgs* (1861), 10 C.B. (N.S.) 713, 142 E.R. 634; and *Graham* v. *Green* (1862), 10 N.B.R. 330.

In two Canadian Courts of Appeal, a general precondition to recaption is recognized: the recaptor must have a right to possession that is specifically enforceable by judicial proceedings. (*Phillips* v. *Murray*, [1929] 3 D.L.R. 76 (Sask. C.A.); *Devoe* v. *Long*, [1951] 1 D.L.R. 203 (N.B.S.C.(A.D.)).) The proposition was first advanced by J.W. Salmond in his first edition of *Salmond on Torts* although it was not supported by authority (J.W. Salmond, *The Law of Torts* (1907), at 148). It was motivated by a desire to keep the self-help remedy from being more extensive than its judicial counterparts. Once Salmond was no longer the editor, the requirement was dropped. (See the eighth edition, W.T.S. Stallybrass ed. (1934).) The requirement is not supportable on principle and is out of the mainstream of authority.

[3] When recaption occurs under circumstances where the recaptor does not commit any of the property torts discussed herein with respect to the subject goods, and where he had not committed any act during recaption that would be tortious absent the fact of recaption, the recaptor has engaged in a "peaceable recaption".

[4] It is typical in repossession cases, which until recently were cases involving recaption authorized by the consent of the recaptee, to cite and apply "wrongful taker" authority which involve recaption rights authorized by law. Section 58(a) of the *Personal Property Security Act*, R.S.O. 1980, c.375, formally merged the two lines of authority, although minor differences may remain concerning liability of the recaptor for damages to the subject chattel, and the rules respecting accession, specification and commingling.

[5] Recaption authority can be traced back to the Salic law where the rules restricted self-help in an effort to halt feuding. During the Anglo-Saxon era recaption began to emerge as a legally endorsed course of conduct. See W. Holdsworth, *A History of English Law* (1966), Vol. II, at 99 *et seq*; and F. Pollock and F. Maitland, *The History of English Law (Before the Time of Edward I)* 2nd ed. (1968), at 157 *et seq*.

[6] *Ibid*.

developed, in the absence of an adequate official constabulary, in order to deter thieves and to thereby discourage breaches of the king's peace.[7] Over time, this penal aspect became subordinate to the recuperative function of recaption and the category expanded to cover cases other than the theft of goods. Recaption rights grew to include cases where goods came into the possession of another by inevitable accident[8] and then became available in all cases of wrongful taking.[9] More recently, recaption rights were recognized in situations where a recaptee came into possession by the voluntary act of the recaptor.[10] Now, recaption rights conferred by the operation of law are properly understood to extend even to cases where the recaptor never had actual possession of the goods prior to recaption but where that recaptor has a right to possession of the goods superior to that of the recaptee.[11]

The other category of recaption rights, those conferred by the consent of the recaptee, is of more recent origin and, until a short time ago, was by far the more common type. Typically, rights to retake goods were contractually conferred by mortgagors in chattel mortgages and by vendees in conditional sales contracts so as to enable the secured parties to realize on the security. Exercise of these contractually conferred rights is often referred to as "repossession".[12]

Indeed at common law this category was expanded by authority to the effect that repossession rights could be implied in chattel mortgages,[13] although curiously, repossession rights had to be expressed in conditional sales contracts.[14] With the advent of the Ontario *Personal Property Security Act*, the cases falling within this category have greatly diminished, and, as it concerns recaption, the difference between chattel mortgages and conditional sales contracts has disappeared.[15] Section 62 of that *Act* now provides

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[7] *Ibid.*

[8] *The Thorns Case* (1466) Y.B. Mich. 6 ed. 4, f.7, pl.18.

[9] *Chapman* v. *Thumblethorp* (1594), 36 Eliz. Roll 113, Cro. Eliz. 330, 78 E.R. 579.

[10] *Blades* v. *Higgs*, *supra*, note 2. In Canada see *McMullin* v. *Campbell* (1920), 56 D.L.R. 728 (N.S.S.C.).

[11] See *Chambers* v. *Miller* (1862), 8 F. & F. 202, 176 E.R. 91, and English Law Reform Committee, *Eighteenth Report (Conversion and Detinue)*, Cmnd. 4774 (1971), para. 116. *Contra*, *Sweeney* v. *Starrat*, [1931] 2 D.L.R. 473 (N.S.S.C.).

[12] Apparently a person who engages in the activity of repossessing goods is known, at least in some parts of the United States, as a "repo man". For some interesting vignettes concerning such persons see what has now become a cult movie: *Repo Man*, Universal City Studio Inc. (1984).

[13] *Alice* v. *Higgins* (1962), 33 D.L.R. (2d) 63 (B.C.C.A.).

[14] *Humphrey Motors Ltd.* v. *Ells*, [1935] S.C.R. 249.

[15] One difference remains in the context of executory consumer purchases. By virtue of the *Consumer Protection Act*, R.S.O. 1980, c.87, s.23 where two-thirds or more of the purchase price has been paid the secured party requires leave of a court to repossess.

that all rights of recaption relating to security interests governed by the *PPSA* arise by operation of law and are confined to those methods permitted by law.[16]

Notwithstanding the presence of some contrary authority,[17] and the different historical pedigrees of the two categories of recaption authority, it can be said then, that, to the extent that the law confers rights of recaption, they are generally available. Recaption authority protects anyone having a right to immediate possession superior to that of the person against whom the remedy is exercised, irrespective of whether that superior right to possession has arisen by virtue of prior possession alone, prior possession supported by title, or a special property interest, or has arisen by contract, gift, devolution, or otherwise.[18] It now remains to spell out what those rights of recaption are.[19]

Because the section addresses itself to recaption rights conferred by the consent of the recaptee through contract, and because the *Personal Property Security Act*, s. 58(a), now confers a statutory recaption right, it is possible that the *Consumer Protection Act* limitation is now ineffective.

[16] Not all cases where repossession may take place pursuant to the contractually obtained consent of the recaptee fall under the *PPSA*. Thus, until recently the *Personal Property Security Amendment Act, 1981*, S.O. 1981, c.2, s.1, left securities properly and exclusively registered under the *Corporation Securities Registration Act*, R.S.O. 1980, c.94 (*CSRA*) outside of its scope. These securities could be realized upon according to the common law remedy of recaption since the *CSRA* is silent in this regard. We note, however, that this exclusion disappeared when the *CSRA* was repealed under legislation which extensively amended the *PPSA: Personal Property Security Act, 1989*, S.O. 1989, c.16, s.84(1).

Personal property security taken under the *Bank Act*, R.S.C. 1985, c.B–1 is at least arguably also outside of the *PPSA* but, again, with the exception of *Bank Act* s.178 securities, repossession is then completely subject to the common law. (*Bank Act* s.173(d) permits banks to take security at the time of the making of a loan on the security of personal property; but no provisions in the *Act* deal with the method of recaption.) S.178 securities (formerly s.88 securities) are taken over such things as goods in the process of manufacturing, raw materials, crops, and fish and fishing equipment. S.178(3) confers a statutory power of repossession and provides that the bank may enter the debtor's land and whenever "necessary for such purpose[s]...[it may] detach and remove such property, exclusive of wiring, conduits and piping incorporated in a building, from any real or immoveable property to which it is affixed."

[17] *Sweeney* v. *Starrat*, *supra*, note 11.

[18] As will become apparent, there are minor differences in the rights that recaptors have, dependent not upon who they are, but rather, dependent upon the circumstances under which the recaptee obtained possession.

[19] While recaption has been used as a defence against the torts of "rescue" and "pound breach" (see *Rich* v. *Wooley* (1831), 7 Bing. 652, 131 E.R. 252), the most common uses of the justification relate to the law of trespass.

2. RECAPTION AND THE USE OF FORCE AGAINST THE RECAPTEE

In Ontario, the use of force by a recaptor against the person of a recaptee, or others, will never be justified by the mere fact that the recaptor was exercising recaption rights, regardless of the lack of entitlement to possession of the recaptee and irrespective of how the recaptee came to have possession.[20] While Ontario authority deals exclusively with force applied during repossession in the commercial context and often deals with criminal law issues, the wide reasoning employed by these courts, and the commingling of wrongful taking and repossession cases, erect a complete bar to the application of force against persons during recaption. In the language of Osler J.A.,

> If the owner can acquire possession peaceably he may do so. If he attempts to take it forcibly and in a riotous manner...he becomes himself a breaker of the law.[21]

Indeed, even where recaption law confers a right upon a recaptor to trespass upon the land of another, the use of force by the recaptor will render the very entry onto that other's land illegal and the recaptor will become a trespasser to land *ab initio*.[22] Moreover, the recaptor cannot establish a right to use force through a contractual term inserted into a security agreement.[23]

The refusal to extend recaption justification to acts of force against the person of another by a recaptor represents a divergence between authority here and that in England[24] and several of the other provinces.[25] In those

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[20] See *Traders Bank of Canada* v. *The G. & J. Brown Manufacturing Company* (1889), 18 O.R. 430 (Ch. D.); *R.* v. *Shand* (1904), 7 O.L.R. 190 (C.A.); *R.* v. *Doucette*, [1960] O.R. 407 (C.A.); *Stackaruk* v. *Woodward*, [1966] 2 O.R. 32 (C.A.).

[21] *R.* v. *Shand*, *supra*, note 20, at 197.

[22] *Devoe* v. *Long*, *supra*, note 2; and *R.* v. *Doucette*, *supra*, note 20, at 414.

[23] *R.* v. *Doucette*, *supra*, note 20.

[24] The English rule permits "[a]ny person entitled to the possession of a chattel [to] retake the chattel...by the use of reasonable force": *Salmond on Torts*, 17th ed., R.F.V. Heuston ed. (1977), at 611; but see *contra*, *Clerk & Lindsell on Torts*, 15th ed., by R.W.M. Dias (1982), para. 8-07 where the authors attempt to maintain the pre-1861 position that force may only be exerted against wrongful takers. It was in 1861 that the controversial case of *Blades* v. *Higgs*, *supra*, note 2, endorsed the use of force against a person in possession who was not a wrongful taker, simply on the basis of the recaptor's right to possession and the recaptee's refusal to deliver up the chattels upon demand.

[25] In New Brunswick the early case of *Graham* v. *Green*, *supra*, note 2, conceded a role for the use of force in recaption. That position seems to have been maintained in the more recent case of *Devoe* v. *Long*, *supra*, note 2, *per* Harrison J., but only for cases involving wrongful takers, following fresh pursuit. The judgment refuses to endorse the use of force in the entry to the land of a wrongful overholder. *Devoe* v. *Long* was cited with approval in the Manitoba case of *J.J. Riverside Manufacturing Ltd.* v. *E.J.W. Development Co. Ltd.* (1981), 9 Man. R. (2d) 774 (Co. Ct.) although the issue of force was not

jurisdictions, a recaptor is provided with a defence in some civil actions for trespass to the person where the recaptor has applied no more force than was reasonably necessary in order to retake his goods.[26]

The Ontario position reflects the same preoccupation that Blackstone had with avoiding breaches of the peace. "[T]he public peace is a superior consideration to any one man's private property".[27] While authority that refuses to condone the use of force during recaption is clear enough to be of predictive value, some modern Ontario cases go farther and define the permissible bounds of the remedy in terms of avoiding breaches of the peace, without providing any useful indication of what that means.[28] Indeed, the term is used in a context wide enough to increase a recaptor's liability beyond that ordinarily provided for by tort law; it seems to prohibit any recaption that could be said to render the application of force almost inevitable, even though the force is instigated by the recaptee in response to an otherwise proper attempt by the recaptor to repossess the subject goods. In other words, provocative recaption may be impermissible. Clearly such an unpredictable standard would render the recaption remedy too risky to use, and this despite the fact that empirical evidence would indicate that recaption is frequently employed and relatively trouble free, at least in the hands of secured lenders, who are its most frequent users.

3. RECAPTION AND TRESPASS TO GOODS

(a) Trespass to the Goods Being Retaken

In a non-secured transaction recaption, if the recaptor is entitled to take the subject goods, he will not typically be responsible for damage done by him to those goods during recaption since he will usually hold the entire

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before that court. The British Columbia Court of Appeal seemed to endorse some role for forcible recaption in *Bennett* v. *The Kent Piano Company Limited and Bourque* (1921), 29 B.C.R. 465, as did the Saskatchewan Court of Appeal in *Phillips* v. *Murray*, *supra*, note 2.

[26] In England, recaption is also a defence to criminal charges of assault (*Salmond on Torts*, *supra*, note 24) although in Canada this is not likely the case. S. 38(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, provides a defence to persons "in peaceable possession" where they use force to take an item of moveable property from a "trespasser", so long as the trespasser is not struck or caused bodily harm. The question arises as to whether a recaptor will ever be considered in peaceable possession during recaption. *Dicta* in *R.* v. *Doucette*, *supra*, note 20, seem to deny any role for recaption as a defence to the use of force.

[27] *Blackstone's Commentaries* (1803), Bk.1, at 4, para. II.

[28] *R.* v. *Doucette*, *supra*, note 20, at 415 *per* Schroeder J.; *Stackaruk* v. *Woodward*, *supra*, note 20; and see the discussion in the context of American authority *infra*, ch. 9.

interest in them.[29] Where others have an interest in the subject goods sufficient to maintain tort actions for damage to those goods, the fact that injury was done by the recaptor during recaption will not provide a defence to those claims, unless such person is the recaptee, in which case the doctrine of contributory negligence may apply.

In the context of a secured transaction repossession, the recaptee will typically have a sufficient interest in the preservation of the subject goods to maintain an action against the recaptor where negligent damage is done to those goods.[30] However, where the debtor is the indirect cause of the injury to the goods, because he has placed them in such a position that damage to them was reasonably necessary for the recaptor to retake them, the recaptor appears to have a complete answer to the claims.[31]

(b) Trespass To Goods Belonging to the Recaptee

Damage to other goods of the recaptee done by the recaptor while retaking the subject goods will not be actionable where such damage was reasonably necessary in order to effect the recaption.[32] This is consistent with some of the law respecting damage done to the fixtures and realty of the recaptee during recaption.[33]

4. RECAPTION AND TRESPASS TO LAND

(a) Introduction

It is apparent that an effective recaption remedy must include some licence to enter on to the recaptee's land. Otherwise, the recaptor will almost invariably commit at least a technical trespass to the land of the recaptee since typically that is where the goods will be found. While it is probably the case that a trespass to land will not be actionable *per se* where the recaptor enters the land of a recaptee in order to retake the subject chattel, there is uncertainty as to whether that can stand as a general proposition.

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[29] It depends on the circumstances whether the recaptor can sue the recaptee for reasonably necessary damages done by the recaptor to the subject goods during recaption. See the property tort discussion *supra*.

[30] *McHugh* v. *Union Bank of Canada*, [1913] A.C. 299 (P.C.).

[31] *Mandelin* v. *Stan Reynolds Auto Sales Ltd.* (1961), 36 W.W.R. 309, 31 D.L.R. (2d) 697 (Alta. S.C. T.D.).

[32] *Stackaruk* v. *Woodward*, *supra*, note 20, supports this conclusion although the issue is not dealt with directly. The court justified the defendant's repossession using recaption authority, and thereby denied the plaintiff's claim for damages caused when the recaptor used a tow truck to remove vehicles that the plaintiff had used to block in the financed car.

[33] See the discussion *infra*.

(b) Trespass *Per Se* To Land and Non-Security Recaptions

It was settled quite early that, where a recaptor could maintain a tort action against the recaptee because the recaptee took the subject chattel from him, the recaptor could enter for the purpose of recaption.[34] That right has been explained as being supported by an implied irrevocable licence that arises whenever a person wrongfully takes the goods of another onto his land.[35]

Subsequently, it was accepted that a recaptor could enter the land of another to retake goods that came to be upon that land by inevitable accident.[36] Then it was recognized that this recaption justification extended to recaptors who entered the land of persons who received the goods from wrongful takers, provided that the wrongful taking was felonious.[37] In other words, categories of cases developed where entry would or would not be permitted, depending upon such factors as the culpability of the recaptee, the extent of the original dispossessor's wrongdoing, and the care exercised by, or the fault of, the recaptor at the time of dispossession. Entry on to the land of the recaptee was never justified, for example, where the goods came onto the land of the recaptee by the intentional act of the recaptor, such as in a bailment situation. Thus, the simple fact of having a superior right to possession did not justify entry; courts weighed the circumstances in each class of case and developed what they considered to be appropriate general rules.

The categorization of recaption justifications for trespass to land erected barriers to the vindication of a superior right to possession that some

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[34] *Higgins* v. *Andrews* (1676), 2 Rolle 55, 81 E.R. 656. See *Blackstone's Commentaries*, *supra*, note 27, ch.1, 4, para. II, where in a confusing passage doubt is cast upon this proposition. The "wrongful taker" rule has been consistently applied in Canada. See *Graham* v. *Green*, *supra*, note 2; *Dillman* v. *Simpson*, [1906] E.L.R. 105 (N.S.); and the *obiter* approval of the rule in *Devoe* v. *Long*, *supra*, note 2.

There is some authority to suggest that a recaptor must first make a demand for the goods (*Winfield and Jolowicz on Torts*, 11th Ed., W.V.H. Rogers ed. (1979), at 468), although the case law cited in support of the proposition presents a situation where a demand was required in order to establish evidence of conversion.

[35] *Patrick* v. *Colerick* (1838), 3 M. & W. 483, 150 E.R. 1235.

[36] *The Thorns Case*, *supra*, note 8; *Dyke* v. *Dunstan*, 6 Ed. 4, at 18; *Read* v. *Smith* (1836), 2 N.B.R. 288; and see *Cameron* v. *Hunter* (1873), 34 U.C.Q.B. 121 for an *obiter* endorsement of the rule. These cases together establish that, before recaption may be justified in this class of case, a request must be made, where reasonably possible, to enter the land in question; and entry must take place at a reasonable time.

[37] *Higgins* v. *Andrews*, *supra*, note 34; *Baldwin* v. *Noaks* (1865), 2 Lutw. 1309, 125 E.R. 723; *Anthoney* v. *Haney* (1832), 8 Bing. 186; *Wilton* v. *Edwards* (1834), 6 Car. & P. 677; and *Patrick* v. *Colerick*, *supra*, note 35. The rule is endorsed in Canadian authority. See *Rayson* v. *Graham* (1864), 15 U.C.C.P. 36 (C.A.); and *Devoe* v. *Long*, *supra*, note 2. It is not clear what the impact of the abolition of the felony/misdemeanour distinction has been upon the rule. *Winfield and Jolowicz on Torts*, *supra*, note 34, at 466, speculates that it should now apply to all criminal takings. J.G. Fleming, *The Law of Tort*, 5th ed. (1977), at 91 n.2, speculates that this may have caused the abolition of the rule altogether.

courts considered to be too restrictive.[38] Such courts responded either with the creation of new categories, or by enunciating a general right of recaptors to enter the land of others to take items over which the recaptors had superior rights to possession. The former response can be seen in the extension of the felonious taker rule so as to allow recaption on the land of receivers from non-felonious takers in cases where those receivers know of the wrongful taking.[39] It can also be observed in the conclusion of some courts that a contract of sale, under which the property in goods passes while they are on the vendor's land, confers upon the vendee an implied licence to enter to take those goods.[40] Examples of the latter response can be found in *dicta* in *Anthoney* v. *Haney*,[41] in the decisions of Fraser J. in *Hamilton* v. *Calder*[42] and *Turner and Wife* v. *Smith*,[43] and, implicitly, in the decisions of *Trader's Bank* v. *G. & J. Manufacturing Company*[44] and *Devoe* v. *Long*.[45]

It is probable that, after full consideration, modern Canadian courts would conclude that the recaptor may enter the land of the recaptee, irrespective of the category of case, so long as no damage is done to that land as a result. To hold otherwise could conceivably lead to an impossible situation whereby the recaptor could not obtain his goods, since the recaptee has no duty at law to hand over the recaptor's goods, and the recaptee may not have committed any property torts that would support a judicial decision through which the recaptor could obtain possession.[46]

(c) Trespass *Per Se* To Land and Security Recaptions

The device of the licence has been used to provide a meaningful right of entry to secured parties in the exercise of their repossession remedy.

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[38] Decisions favouring the more restrictive approach include: *Wilton* v. *Edwards* (1834), 6 Car. & P. 675; *Kearry* v. *Patterson*, [1939] 1 K.B. 471; *Wilde* v. *Waters* (1855), 24 L.J.C.P. 193; *British Economical Lamp Company (Limited)* v. *Empire Mile End (Limited) and Another* (1913), 29 T.L.R. 386 (K.B.D.); *Cameron* v. *Hunter* (1873), 34 U.C.Q.B. 121; *Morrison* v. *Thomas*, [1922] 1 W.W.R. 215 (Sask. C.A.); *Sweeney* v. *Starrat*, *supra*, note 11; *Wentzell* v. *Veinot and Hall*, [1940] 1 D.L.R. 536 (N.S.S.C.).

[39] *Huet* v. *Lawrence*, [1948] Q.S.R. 168, cited as the law in England by H. Street, *The Law of Torts*, 6th ed. (1976), at 83; and *Salmond on Torts*, 17th ed., *supra*, note 24, at 611.

[40] *Wood* v. *Manley* (1839), 11 Ad. & C. 34, 113 E.R. 325; *Giles* v. *Simmonds* (1860), 15 Gray 441; *McNeal* v. *Emerson* (1860), 15 Gray 384; *contra*, *Sweeney* v. *Starrat*, *supra*, note 11.

[41] *Supra*, note 37. For a much older general statement see *Chapman* v. *Thumblethorp*, *supra*, note 9.

[42] (1883), 23 N.B.R. 373.

[43] *Supra*, note 20.

[44] (1889), 18 O.R. 430.

[45] *Supra*, note 2, *per* Harrison J., at 220.

[46] See *Morrison* v. *Thomas*, *supra*, note 38; *British Economical Lamp Company (Limited)* v. *Empire Mile End (Limited) and Another*, *supra*, note 38; and see the discussion in *Moffat* v. *Kazana*, [1969] 2 Q.B. 152, at 157.

Although a contractual licence can generally be revoked at common law where its irrevocability is not expressly or impliedly provided for,[47] a secured party's licence, being coupled with an interest, is irrevocable because it confers a right in the chattel, located on the debtor's property.[48] In fact, the necessary licence may be implied in instances where the security agreement does not include a term granting express permission.[49] Moreover, a secured party will have the same privileges to enter the land of third parties who are subject to the security interest as he possesses against the debtor himself.[50]

(d) Trespass to Land Causing Damage to the Realty

Present law grants, in most cases, a right to a recaptor to do reasonable and necessary damage to effect recaption.[51] The privilege has extended to the forceful breaking open of a recaptee's doors[52] and the breaking of some boards off the recaptee's barn with an axe.[53] Yet the right to do reasonable and necessary damage to land and realty in aid of recaption is not available in all fact situations. It does not apply in cases of inevitable accident, where the recaptee is in no way responsible for the presence of the chattel on his land.[54] All of the damage justification cases involved damage to the land of wrongful takers,[55] so it is impossible to be sure whether the justification extends to other categories of case, or whether it would accompany the development of a general trespass to land justification. In security recaptions the matter is often settled by an express licence permitting such damage, and even in the absence of such a licence, it is probable that one would be implied; after all, recaption has been held to constitute a defence to damage to the goods of a recaptee in the secured transaction context.[56] It

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[47] *Winter Garden Theatres London* v. *Millenium Productions Ltd.*, [1948] A.C. 173 (H.L.).

[48] *Winfield and Jolowicz on Torts*, *supra*, note 34, at 343; *Woods* v. *Manley*, *supra*, note 40; *Wood* v. *Leadbitter* (1845), 13 M. & W. 836, 153 E.R. 351; in *Stackaruk* v. *Woodward*, *supra*, note 20, McGillivray J. treated an implied licence based upon a statutory right to repossession as irrevocable.

[49] *Traders Bank of Canada* v. *G. & J. Brown Manufacturing Ltd.*, *supra*, note 20, at 433; *The Boston Marine Insurance Co.* v. *Longard* (1894), 26 N.S.R. 387, at 390 (C.A.); *Stackaruk* v. *Woodward*, *supra*, note 20.

[50] *Traders Bank of Canada* v. *G. & J. Brown Manufacturing Ltd.*, *supra*, note 20.

[51] *Rayson* v. *Graham*, *supra*, note 37; *Graham* v. *Green*, *supra*, note 2; *Austin* v. *Dowling* (1870), L.R. 5, C.P. 534; *Turner* v. *Smith* (1888), 29 N.B.R. 567; *contra*, *Dillman* v. *Simpson*, *supra*, note 34; and *Rich* v. *Wooley*, *supra*, note 19.

[52] *Rayson* v. *Graham*, *supra*, note 37.

[53] *Graham* v. *Green*, *supra*, note 2.

[54] *Read* v. *Smith*, *supra*, note 36, at 294.

[55] The possible exception is *Turner* v. *Smith*, *supra*, note 51. The facts of the case are not revealed, and it may be an "inevitable accident" decision.

[56] *Stackaruk* v. *Woodward*, *supra*, note 20, where the plaintiff's claim for damages done to his vehicles when the recaptor removed them was refused by the court.

should also be noted that the uncertainty surrounding provocative recaptions could render the right to do damage in aid of recaption a precarious one.[57]

(e) Entry to Dwelling Houses in Aid of Recaption

It is unclear if these privileges to enter, and to do reasonable and necessary damage, extend to dwelling houses. On the one hand, there is authority which does not draw distinctions between dwelling houses and yards,[58] and on the other, there are *dicta* in some cases sharing the sentiments of McPhillips J. of the British Columbia Court of Appeal that:

> One of the cardinal and fundamental principles of English law is that an Englishman's house is his castle. Some say that this has been affected in some way by recent decisions, but I do not agree, as in Holt's time so in our time, the Englishman's house is his castle.[59]

In this context, it is again important to consider the serious impact that a prohibition on provocative recaptions could have upon this issue.

(f) Trespass To Land *Ab Initio*

As indicated, a recaptor who persists in attempting to retake goods after it becomes clear that force will be required becomes a trespasser to land *ab initio*, irrespective of any other tort liability to which he exposes himself where force ensues.[60] Similarly, if a recaptor exceeds the terms of an express or implied licence in the course of recaption (as in doing more than reasonable and necessary damage to the recaptee's property) he too becomes a trespasser *ab initio*.[61] This consequence is serious, not only because it invites civil consequences, but because it causes the removal of the criminal or quasi-criminal defences usually available to a recaptor.[62]

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[57] See the discussion *supra*, this chapter, text following note 28.

[58] *Rayson* v. *Graham*, *supra*, note 37; *Burridge* v. *Nicholetts* (1861), 6 H. & N. 383, 158 E.R. 158; *McNeal* v. *Emerson* (1860), 15 Gray 384.

[59] *Bennett* v. *The Kent Piano Company Limited and Bourque* (1921), 29 B.C.R. 465, at 469-70; see also *Devoe* v. *Long*, *supra*, note 2.

[60] *R.* v. *Doucette*, *supra*, note 20. See the discussion *supra*, accompanying note 22; and see *Devoe* v. *Long*, *supra*, note 2.

[61] *Frank* v. *Bogue* (1921), 20 O.W.N. 96 (Ont. Div. Ct.); *Lunn* v. *Turner*, [1848] 4 U.C.Q.B. 282.

[62] The *Trespass to Property Act*, R.S.O. 1980, c.511, exonerates a recaptor from liability under the *Act* only so long as the recaptor is "acting under a right or authority conferred by law" (s.2(1)). S.177 of the *Criminal Code*, R.S.C. 1985, c.C-46, exempts a recaptor from the charge of trespass at night, but only so long as the recaptor has a lawful excuse.

5. THE IMPACT OF THE COMMISSION OF TORTS RELATING TO THE METHOD OF RECAPTION

A recaptor who commits a non-justifiable tort during the course of a recaption will be subject to the appropriate judicial remedy. It should be remembered, however, that the repossession itself is not invalidated, even if the recaptor is subject to civil or criminal consequences as a result of the method of recaption. In *Wentzell* v. *Veinot and Hall*, Doull J. stated:

> [N]o matter how wrongful the taking may have been [the recaptee] is not entitled to get [the goods] back.[63]

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[63] [1940] 1 D.L.R. 536 (N.S.S.C.), at 538-39.

CHAPTER 9

RECAPTION IN THE UNITED KINGDOM AND THE UNITED STATES

1. THE LAW OF RECAPTION IN THE UNITED KINGDOM

(a) Introduction

Our common law of recaption is based upon English precedent and remains materially the same as English law. In rare cases our courts have deviated from English authority and, in isolated instances, our legislators have taken different paths on certain relatively minor issues in the context of secured party recaptions. The differences between the Canadian and English positions are as follows.

(b) Peaceable Recaption

The rules relating to peaceable recaption are the same as those in Canada except in the case of executory consumer purchases. In England, by virtue of the English *Consumer Credit Act 1974*,[1] where under a hire-purchase transaction the "hirer" is not a corporation, and the amount involved in the sale is under £5000.00, the creditor may terminate the agreement and recover possession only after giving seven or more days notice to the "hirer" to remedy the default in question.[2] The provision is intended to ensure that the creditor does not act on minor breaches by the debtor.[3]

(c) Forcible Recaption

The present English rule permits any person entitled to possession of a chattel to retake it by the use of reasonable force. Recaption constitutes both a civil and common law criminal defence.[4] Clerk and Lindsell seek to

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[1] 1974, c.39 (U.K.).

[2] S.87.

[3] See P.S. Atiyah, *The Sale of Goods* 6th ed. (1981), at 403.

[4] See, *supra*, ch. 8.

maintain the position that applied prior to the decision in *Blades* v. *Higgs*[5] that force could only be used where the recaptee's possession was wrongful at its inception; in other words, it could not be used in bailment or secured transaction cases.[6] Notice is required that force will be used to retake the goods before such force is justified.[7]

(d) Trespass To Land And Recaption

The English law suffers from the same debate that informs the Canadian jurisprudence concerning entry onto land in the course of peaceable recaption: the categorization of fact situations as opposed to a general right to enter land.[8] The only notable differences relate to licences to enter land in the context of secured transactions of the "hire-purchase" or "conditional sales" variety. The English *Consumer Credit Act 1974*[9] requires a creditor to obtain a court order before he may justifiably enter the land of a debtor under a hire-purchase arrangement.[10] An express licence to enter is a nullity.

2. ENGLISH REFORM EFFORTS

(a) Reform And Peaceable Recaption

The English Law Reform Committee in its *Eighteenth Report* did not see the need for retrenchment of the right to peaceably retake one's goods. Their efforts, like our own, are concentrated upon the extent to which recaption should constitute a defence to otherwise tortious action.

(b) Reform And Forcible Recaption

Most of the Committee's efforts with respect to recaption related to the use of force while retaking the goods. After considering a variety of different views on the subject, the Committee chose to continue the use of force as a justifiable activity associated with recaption; the primary reason they endorsed forcible recaption was that it "touches very closely the ordinary man's conception of his fundamental rights."[11]

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[5] (1861), 10 C.B. (N.C.) 713, 142 E.R. 634.

[6] *Clerk & Lindsell on Torts*, 15th ed., ed. by R.W.M. Dias (1982), para. 8-07.

[7] See English Law Reform Committee, *Eighteenth Report (Conversion and Detinue)* Cmnd. 4774 (1971), para. 117. *Contra*, *Whatford* v. *Carty*, [1960] C.L.Y. 3258, treated by the editors of *Salmond on Torts* as an example of a contrary opinion: *Salmond on Torts*, 17th ed. R.F.V. Heuston ed. (1977), at 611.

[8] See *supra*, ch. 8.

[9] *Supra*, note 1.

[10] S. 92.1.

[11] Cmnd. 4774 (1971), para. 122.

The Committee chose to recommend that force be regulated by very general criteria that could be applied by courts on a case-by-case basis, the Committee having formed the opinion that no hard and fast lines could be drawn. They recommended that force would be permitted only in cases where it was reasonable in degree and necessary, and that all of the circumstances should be considered in that assessment, including the method by which the recaptee gained possession, the degree of resistance offered by the recaptee, the recaptor's need for immediate possession, and the nature and value of the chattel.[12] Finally, the Committee indicated implicitly that in secured transactions of the hire-purchase or conditional sales variety, no force be permitted unless its use is contemplated in the security agreement.[13]

The use of force in the context of recaption was commented upon by the English Law Commission in its *Working Paper No. 54* dealing with the forcible entry to land.[14] The Commission came out against the use of force. It suggested that the threatened or actual application of force to gain entry to land to retake a chattel should never be considered "reasonable".[15]

(c) Reform And Trespass To Land

Entering the land of a recaptee to effect recaption was not given detailed consideration in the *Eighteenth Report*. The Committee rested content to impose the same standard of reasonableness as they did with respect to the use of force.[16] Such factors as the recaptor's effort to secure permission to enter, and the nature of the premises or land entered, would be considered in the assessment.[17]

While both the Law Reform Committee Report and the English Law Reform Commission Working Paper have led to the passage of legislation,[18] none of the recommendations made concerning recaption were implemented.

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[12] *Ibid.*, para. 126.

[13] The Committee does so indirectly by stating that no use of force would be permitted at all in such cases "without consent". The phrase is not elaborated upon and may indicate that no justification for force or trespass is acceptable in such cases; only a licence conferred at the time by the possessor will do: *ibid.*, para. 125.

[14] *Offences of Entering and Remaining on Property*, June 28, 1974, at 20, para. 38.

[15] *Ibid.*

[16] Again, in trespass to land cases involving hire-purchase and conditional sales cases, an express licence, or perhaps consent at the time of entry, would be required: *supra*, note 11, para. 125.

[17] Cmnd. 4774 (1971), para. 125.

[18] The former report as we have noted led to the passage of the *Torts (Interference with Goods) Act 1977*, while the latter paper resulted in certain provisions embodied in the *Criminal Law Act 1977*, 1977, c.45 (U.K.).

3. COMMENTS ON ENGLISH LAW AND REFORM CONCERNING RECAPTION

As will be developed in the following chapter, we are not persuaded by the English common law position or the Law Reform Committee recommendations concerning force and recaption. It is our opinion that the availability of judicial remedies speaks against any concession to the use of force, given the dangers inherent in any condonation of the use of force. We do not feel that a retrospective assessment of reasonableness compensates for these risks. To this extent, we agree with the English Law Commission that "in the interest of preserving public order we do not think that there should be any such right."[19]

The approach of the Law Reform Committee to trespass to land during recaption also differs from the one that we favour. Rather than leaving the assessment of a justification to a court applying hindsight, we prefer the certain line of permitting trespasses *per se* while not permitting those attended with damage, coupled with an absolute prohibition against entry to dwelling houses. To the extent that the Law Reform Committee recommendations permit reasonable damage and reasonable entry of dwelling houses, to be assessed on a case-by-case basis, we cannot agree.

Finally, we see no need in Ontario to confine entry in conditional sales cases to those where express licences are contained in the contracts, nor do we see the need here for the restrictions imposed by the English *Consumer Credit Act 1974*.[20] The limitations we recommend on the method of recaption coupled with *Consumer Protection Act*[21] provisions[22] and the Ontario position of restricting the secured party's post-recaption actions, are sufficient to protect conditional vendees.

4. THE LAW OF RECAPTION IN THE UNITED STATES

(a) Introduction

It has been observed that "[s]elf-reliance, perseverance, ingenuity, and the noble notion of rugged individualism have been pervasive themes in the American lifestyle since the pre-colonial era."[23] Given this, the Americans

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[19] *Supra*, note 14, at 20, para. 38.

[20] *Supra*, note 1.

[21] R.S.O. 1980, c.87.

[22] As amended to clarify the application of s.23(1) to *Personal Property Security Act* cases: see *infra*, ch.10.

[23] Special Project, "Self-Help: Extrajudicial Rights, Privileges and Remedies in Contemporary American Society" (1984) 37 Vand. L. Rev. 845, at 849.

have experienced tensions between permitting individual initiative to redress wrongs and developing workable restrictions that sustain order. Thus, in the United States, as here, the real issue has not been whether to permit recaption (peaceable recaption is not proscribed by law) but rather the extent to which conduct associated with recaption should be justified. By way of general observation, the Americans have retained, to a greater extent than we have, relatively direct relationships between recaption privileges and questions of prior possession by the recaptor. They have also tied the extent of recaption rights to determinations of fault. Because of this they have moved less to developing a general right to vindicate legal rights to possession by recaption, and have continued to categorize cases where such rights support recaption justifications. Given this, a sharp line is drawn between security agreement repossession and non-security agreement recaption.

(b) Non-Security Agreement Self-Help: The Use Of Force

A recaptor who has a right to immediate possession of a chattel may use reasonable and necessary force, short of the infliction of serious bodily harm, to recapture the chattel where the recaptee has tortiously taken it.[24] Prosser inferentially limits the right to cases where the recaptee has used duress, force or fraud in obtaining the chattel.[25] The *American Restatement Second on the Law of Torts* concedes the use of force in the absence of duress, force or fraud, so long as the wrongful taker does not have a claim of right, or where a recaptee, with a claim of right, is in the process of removing the chattel from the recaptor's premises.[26] What is clear is that force cannot be used where the recaptee has rightfully acquired possession, such as in a bailment situation.[27] The *Restatement Second* distinguishes cases where the recaptee is a mere custodian,[28] in which case recaption is permitted.[29] Force may be employed against a third party who has received the goods from or through the original dispossessor and who has notice that the dispossessor acquired the chattel under circumstances which made forcible recaption justifiable against that dispossessor.[30] Finally, in situations involving both dispossessors and third party receivers, the doctrine of fresh pursuit survives to an extent; "[recaption] is limited to prompt discovery of the disposses-

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[24] *Ibid.*, at 887. *Contra*, *Stuyvessant* v. *Silcox* 92 Mich. 233, 52 N.W. 465 (1892).

[25] *Prosser and Keeton on Torts*, 5th ed., W. P. Keeton ed. (1984), at 138.

[26] *Rest. 2d Torts*, Appendix, Vol. I (1966), at 110.

[27] *Ibid.*

[28] Custody, as opposed to possession, exists where the holder of the subject goods is entrusted with physical possession to accomplish a purpose on behalf of the possessor or otherwise, in the presence of or on the premises of the possessor. See *ibid.*, at 178.

[29] *Ibid.*

[30] *Ibid.*, at 111. Accord, Prosser, *supra*, note 25, at 119.

sion, and prompt and persistent efforts to recover the chattel thereafter."[31] The criminal defence associated with forcible recaption is slightly more extensive than the civil justification: it exonerates force where the recaptor honestly, as opposed to reasonably, believes that force must be used to recapture the property.[32]

Thus it can be seen that the use of force is more readily accepted in the United States than it is in Ontario, although in reality the greater tolerance of force is not appreciable: it is confined by a broadened notion of fresh pursuit and is primarily limited to wrongful taking. These limits together make forcible recaption in the United States very much akin to the defence of peaceable possession in Ontario. In the context of the defence of peaceable possession, we do not endorse the American approach of categorizing the nature of the dispossession, depending upon the way in which the recaptee acquired possession, or the recaptee's belief in his right to such possession. To the extent it is condoned, the right to defend one's peaceable possession from a wrongful taker should be generally available in the interests of certainty.

(c) Non-Security Agreement Self-Help: Trespass To Land And Recaption

The American approach of categorizing cases according to the attribution of fault that is evident above persists in the context of justifiable trespasses to land. Where the chattel is on the recaptee's land because of the recaptee's tortious or careless conduct, the recaptor is privileged to enter that land to retake it and the recaptor may do reasonable and necessary damage to effect that retaking.[33] Where the chattel has come on to the recaptee's land, without the consent or negligent conduct of the recaptor and without the tortious or negligent conduct of the recaptee, such as by inevitable accident, or where a third person brings it on to the recaptee's land, the recaptor may enter and retake the chattel, although the recaptor is liable for any damage done.[34] Entry must be in a reasonable manner, which restriction could require notice,[35] or the provision of an opportunity to the recaptee to investigate the recaptor's claim of right.[36] Finally, where the "chattel has come upon the land through the fault of the [recaptor], or with his consent, he has no privilege to enter."[37]

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[31] Prosser and Keeton, *supra*, note 25, at 138 and see Special Project, *supra*, note 23, at 807-08.

[32] *Model Penal Code* (1962), s.306(1)(a).

[33] *Rest. 2d Torts* (1965), sec.200.

[34] *Ibid.*, sec.198; accord, 75 *Am. Jur. 2d* (1974), Trespass, sec.44.

[35] *Rest. 2d Torts* (1965), sec.198, comment d.

[36] *Ibid.*, sec.198, comment g.

[37] Prosser and Keeton, *supra*, note 25, at 140.

As will be further developed in the next chapter, the American position is more permissive, and yet more restrictive, than the one we advocate. According to American law, damage may be done where the recaptee's fault is implicated, yet entry is refused entirely where the goods are on the recaptee's land because of the recaptor. We consider the causing of damage to be too disruptive of the public peace to be justified under any circumstances, and we believe that trespasses *per se* represent such a mild intrusion upon the recaptee's rights that they should be justified, even in cases where the recaptor originally put the recaptee into temporary possession.

(d) Recaption Pursuant To Security Agreements

As in Ontario in the context of chattel mortgages, courts in the United States implied a repossession right into security agreements at common law.[38] The right to repossess carried with it an express or implied power to enter the debtor's land and to use some force. The repossession remedy was substantially changed, however, with the adoption of the *Uniform Commercial Code*.[39] Section 9-503 authorizes repossession where default has occurred. It provides that:

> Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action.

Thus, the article "more severely restricts the permissible methods of taking possession of collateral than did the common law."[40] Force during repossession is no longer tolerated. With respect to trespasses to the debtor's land,

> [i]t would appear that the Uniform Commercial Code has the effect of permitting the secured party to enter the premises of the debtor to effect repossession of the collateral, so long as no breach of the peace has been committed.[41]

According to one commentator, the *UCC* in effect, provides "that entry [to land] is permitted unless the contract says otherwise and gives a repossessing creditor the right to enter the debtor's home without consent upon default."[42]

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[38] Special Project, *supra*, note 23, at 917.

[39] Approved by the Commissioners on Uniform State Laws 1972.

[40] Special Project, *supra*, note 23, at 919.

[41] 69 *Am. Jur. 2d* (1973), Secured Transactions, sec.595.

[42] M. Huffmire, "Repossession Without Judicial Process: What Lies Ahead?" (1978) 15 Am. Bus. L. J. 321, at 323.

Having said that, it should be noted that the use of the language of "breach of the peace" has cast an aura of uncertainty around the extent of the repossession right. Although case law differs as to what will constitute such a breach,[43]

> [t]he courts have interpreted this provision as prohibiting repossessions that include violence, actual or potential force, intimidation, fraud or trickery. The U.C.C.'s breach of the peace language and the judiciary's broad interpretation of this language suggests that courts and legislatures today seek to discourage violent activity by prohibiting self-help repossession that is "fraught with the likelihood of resulting violence."[44]

Thus, it can be seen that the American approach in security agreement cases is much like the provocative recaption ban suggested by certain Ontario Court of Appeal cases.[45] In the next chapter we develop recommendations which indicate a preference for attempting to identify sufficiently provocative cases, such as the entry of a dwelling house or the infliction of damage during recaption, and to erect clear barriers in these instances, rather than to leave the law subject to such an uncertain standard.

It should also be noted that, while the *UCC* seems to permit debtors, in the security agreement,[46] their right to be free from wrongful repossession, it has been suggested that a court would refuse to endorse this as a matter of public policy.[47] As indicated, we favour making such a suggested policy a matter of expressed law. Finally,

> U.C.C. 9-507(1) limits damages for wrongful possession to any loss actually caused, or in any case to ten percent of the cash price plus the time differential where consumer goods are involved, [although] courts seem prepared to grant larger punitive damage awards with a showing of sufficient intentional disregard of the consumer's rights.[48]

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[43] Contrast *Girard* v. *Anderson* 219 Iowa 142, 257 N.W. 400 (1934) (entry to debtor's home a breach of peace) with *Cherno* v. *Bank of Babylon* 54 Misc. 2d 277, 282 N.Y.S. 2d 114 (Sup. Ct. 1967) aff'd 29 App. Div. 2d 767, 288 N.Y.S. 2d 862 (2d Dept. 1960) (entry to debtor's home not a breach of peace); *Morris* v. *First Nat. Bank & Trust Co. of Ravene Ohio* 21 Ohio St. 2d 25, 254 N.E. 2d 683 (1970) (confrontation by demand to leave renders further repossession a breach of peace) with *Harris Truck & Trailer Sales* v. *Foote* 58 Tenn. App. 710, 436 S.W. 2d 460 (1968) (require violence or threat of violence for breach of peace); *Ford Motor Credit Company* v. *Byrd* 351 So. 2d 557 (Ala. 1977) (repossession by trickery, stealth or fraud is a breach of peace) with *Thompson* v. *Ford Motor Credit Co.* 550 F. 2d 256 (5th Cir., 1977) (repossession by trickery, stealth or fraud is not a breach of peace).

[44] Special Project, *supra*, note 23, at 919.

[45] See *supra*, ch. 8.

[46] UCC sec.9—501(3), which lists those portions of Article 9 that cannot be waived by contract, omits reference to repossession.

[47] B. Clark & J. Fonseca, *Handling Consumer Credit Cases* (1972), at 94-95.

[48] *Ibid.*, at 94.

5. AMERICAN REFORM INITIATIVES

The only fact situations where the law of repossession or recaption has attracted reform attention in the United States seems to be in the context of repossessions from consumer purchasers. Reformers and legislators devoted considerable energy during the 1970's to protecting consumer debtors who were viewed as vulnerable. Responses to repossession in this context range from permitting repossession to occur as it always has, subject to *UCC* restrictions, to the complete removal of the remedy of extra-judicial repossession. The following initiatives are representative.

There have been several efforts to develop a uniform system of consumer protection in the United States which would affect recaption rights. Most notable are the *Uniform Consumer Credit Code 1968*[49] and the 1974 text of the same *Code*.[50] The 1968 version does not address itself to the method of repossession or require judicial involvement before repossession. It simply forces a creditor to choose between repossession or a deficiency judgment where the consumer good is valued at less than $1000.00.[51] This provision would serve to discourage the use of repossession in many cases.

The *UCCC 1974* was drafted in response to frequent criticisms made of the 1968 version.[52] It was also influenced by the National Commission on Consumer Finance, "which in 1972 called for notice to the debtor and an opportunity to be heard on the merits of the underlying claim prior to self-help."[53] The Commissioners responded by requiring notice prior to repossession.[54] The *UCCC 1974* forbids repossession of household goods where they are taken as collateral security and not under a purchase money security interest.[55] Moreover, dwelling houses cannot be entered without the consent of the occupants unless entry is done under the supervision of the court.[56]

In 1970 the National Consumer Law Center at Boston College Law School drafted a model *Act for Consumer Protection* which was called the

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[49] Approved by the Commissioners on Uniform State Laws (herein referred to as *UCCC 1968*). This draft act has been adopted in Colorado, Indiana, Idaho, Oklahoma, South Carolina, Utah, Wisconsin and Wyoming.

[50] Approved by the Commissioners on Uniform State Laws (herein referred to as *UCCC 1974*). This draft act has been adopted in Iowa, Kansas, Maine and Connecticut.

[51] Sec. 5.103(2).

[52] See T. Hoidal and H. Hull, III, "Self-Help Repossession: The Constitutional Attack, the Legislative Response, and the Economic Implication" (1973) 62 Geo. L. J. 273, at 298 n. 160.

[53] Huffmire, *supra*, note 42, at 332.

[54] Sec. 109.

[55] Sec. 116.

[56] Sec. 112.

National Consumer Act (NCA). It was far more extreme in its limitations upon consumer sale repossession than the *UCCC 1974*. It proposed the abolition of the non-judicial enforcement of consumer security interests under the model *Acts*.[57] Consumer creditors must serve complaints prior to repossession and must give the debtor 15 days to remedy the default.[58] Moreover, the consumer debtor is entitled to an expedited default hearing[59] and, if a substantial issue is raised during that hearing, to a full hearing.[60] Only if the creditor establishes his right to possession can he repossess. The model *Act* was considered too extreme in several respects, in particular in the definitions of "default" and the concession to consumer debtors to cure default by tendering the consumer goods. A toned down and redrafted model *Act*, the *Model Consumer Credit Act 1973*, which still remains more extreme than the *UCCC 1974*, has been adopted in several states.[61]

There has also been independent legislative activity in various states dealing with consumer sales and repossession. Among the most extreme statutes is the *Wisconsin Consumers Act*,[62] which was influenced by the *NCA*. It requires in all cases an expedited hearing before repossession, and limits the methods of repossession by excluding repossession in dwelling houses. The District of Columbia *Consumers Protection Act*[63] virtually eliminates self-help repossession in the context of consumer sales, except where repossession takes place under an automobile installment loan. In all other cases repossession can only take place with the consent of the debtor.[64]

In California, licensed repossessors must comply with a code of conduct promulgated by the Bureau of Collection and Investigation Services.[65] Moreover, the *California Business and Professional Code*[66] proscribes certain conduct by licensed repossessors although its provisions are directed predominantly at the relationship between the secured party and the repossessor.[67]

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[57] Sec. 204.

[58] Sec. 207(1).

[59] Sec. 208(1).

[60] Sec. 208(2).

[61] Alabama, Florida, New Hampshire, West Virginia.

[62] Wisc. Stat. Ann., secs. 421.101-427.105 (Supp. 1973).

[63] Pub. L. No. 92–200, 85 Stat. 665 (1971).

[64] D.C. Code Ann., sec. 28–3812(d) (Supp. 1972).

[65] Cal. Bus. & Prof. Code, secs. 7510, 7514 (West 1964).

[66] *Ibid*.

[67] For a synopsis of the *Code's* requirements in this regard see W. Burke and D. Reber, "State Action, Congressional Power and Creditor's Rights: An Essay on the Fourteenth Amendment, Part III" (1973) 47 So. Cal. L.Rev. 1, at 17.

It is quite clear that the reforms discussed above were influenced by what was perceived to be a pattern of "repossessing abuses, particularly in the household goods and used car markets".[68] Moreover, the reforms relate to a particular species of recaption alone: repossession in the context of consumer sales where the sharp practices of vendors holding economic advantage over the consumer, created an attitude of protectiveness on the part of legislators and reformers that is not generalizable in the recaption area. It would simply be misplaced in the context of wrongful takers.

For reasons further developed in the next chapter, we considered, but rejected, the advisability of imposing a code of conduct and a notice requirement. We also considered the desirability of letting a recaptee state his case prior to recaption. On balance, we concluded that the interference with the remedy caused by such provisions would not be compensated for by the advantages to which they lead, given that a recaptee will have an action in tort for wrongful recaption where a recaptor errs. Even in the United States there has been significant concern expressed over the economic and practical impact of imposing serious stumbling blocks to recaption.[69] Given that concern, and our inability to uncover evidence of abuse by secured parties in the exercise of recaption, we decided not to recommend legislation for Ontario that would mirror or adapt the reform initiatives that have taken hold in the United States.

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[68] Huffmire, *supra*, note 42, at 333.

[69] See, for example, R. Johnson, "Denial of Self-Help Repossession: An Economic Analysis" (1973) 47 So. Cal. L. Rev. 82; E. Dauer and T. Gilhool, "The Economics of Constitutionalized Repossession: A Critique for Professor Johnson and a Partial Reply" (1973) 47 So. Cal. L. Rev. 151; and Hoidal and Hull, *supra*, note 52, at 312-323.

CHAPTER 10

RECAPTION PROPOSALS FOR REFORM

1. THE REMEDY OF PEACEABLE RECAPTION

(a) Introduction

As indicated in chapter 8, the present law of recaption is sometimes uncertain. The history that led to the development of the present rules discloses a perplexing irony: at times rights of recaption were restricted to encourage lawfulness by discouraging confrontation,[1] while at other times the right to retake goods was granted to discourage the crime of theft.[2] Other dramatic changes in function mark its history. The right to retake one's goods was initially granted for the public good, forming part of the system of law and order.[3] Recaption rights originally protected only actual possession; now they also protect superior rights to possession. Rules that developed to fulfil the conflicting policies of each chapter in history have coalesced in the present law. The result is the uncertainty that we have identified and a need to re-examine the rules in light of contemporary circumstances and policies.

It is apparent that the primary value in conferring recaption rights is that property rights are vindicated where persons having higher rights to possession acquire actual possession informally and expeditiously. The chief mischief inherent in the remedy is its potential to cause violence, injury and damage. In this chapter we consider and suggest changes in the law. In our proposals, we seek to balance the value of recaption against its costs, in light of the improvements that we recommend to the judicially based remedies. In particular, we recommend that the law of recaption be stated in such a way as to remove the existing uncertainties and to maintain the remedy, while limiting, as much as possible, its potential for causing damage and violence.

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[1] Such as under Salic law, and as related by Blackstone. See the discussion *supra*, ch. 8.

[2] Such as during the Anglo-Saxon periods immediately before and during the 10th century: ch. 8.

[3] Indeed, the right of the recaptor to keep the goods he has retaken was considered to be a reward for "being forward in the prosecution of a malefactor". F. Pollock and F.W. Maitland, *The History of English Law (Before the Time of Edward I)* 2nd ed. (1968), at 165-66.

(b) Peaceable Recaption—Should it be Forbidden?

As indicated in chapter 8, whenever a recaptor secures possession of the subject chattel without engaging in any acts that could be tortious had they occurred in a non-recaption setting, peaceable recaption has occurred. No positive rules are implicated in the endorsement of peaceable recaption; it is circumscribed by the prohibitory rules of tort and criminal law.

As discussed in the previous chapter, there were periods in history when the right to takes one's own goods peaceably was seriously restricted in the interests of the public peace, even though the law conceded a higher right in the subject goods to the potential recaptor. Even some modern authority seeks to restrict recaption rights where no tortious or criminal liablility would otherwise arise in the taking.[4] Notwithstanding these efforts, peaceable recaption is at present permissible.

Any comprehensive consideration of the law of recaption would involve consideration of the complete abolition of the right to retake one's goods without the assistance of the judicial process. We do not favour such abolition for several reasons. First, our Empirical Study indicated that recaption is an effective and relied upon remedy of secured lenders. At the same time, our information indicated no significant abuse of the remedy that would warrant its abolition. Second, to abolish the possibility of the extra-judicial recovery of goods would mean that secured creditors would be forced to take judicial proceedings in all cases where settlement with the possessor did not occur. This would impose an extra, and, we believe, unwarranted, burden upon the judicial system. Third, we could foresee difficulties in effectively forbidding peaceable recaption, other than perhaps by criminal sanction. For instance, such a prohibition would have a dubious deterrent effect where the recaptor is not a secured lender because such a recaptor would not likely be aware of the prohibition. In addition, it would be unfair and ineffective to impose civil liability upon such a recaptor after the event when, by definition, no force was used and no damage was done. In the case of a secured lender such a prohibition would be known and effective but, as was stated above, we find no significant abuse of the remedy by secured lenders. As for a criminal sanction, it strikes us as inappropriate to recommend the imposition of criminal liability for peacefully taking possession of one's own property. Finally, we are struck to some extent by the diminution in the value of the right to possession that would occur should the entitlement to enforce that right be confined to judicial methods. We believe that the recommendations that we do make concerning the method of recaption will purge the remedy of significant potential for abuse while leaving it as an effective and peaceful alternative to judicial relief.

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[4] See, for example, C.A. Branston, "The Forcible Recaption of Chattels" (1912) 61 L.Q.Rev. 262 and the discussion of *Phillips* v. *Murray*, [1929] 3 D.L.R. 76 (Sask. C.A.).

(c) Should There be a Code of Conduct for Recaptors?

Having said that, it must be conceded that not every legal method of recaption warrants enthusiastic embrace. Circumscribing the limits of peaceable recaption with the present prohibitory rules of tort and criminal law leaves open, for example, the possibility of recaption by trickery. We are not totally comfortable with a position that permits recaption by deception. There is something distasteful about condoning trickery, particularly where a recaptee has a colour of right or is an unaware bailee holding the goods for a wrongful taker or possessor. Yet, on balance, we are not persuaded that the distastefulness warrants the abolition of this method of retaking.

We considered but, on balance, do not recommend a statutory code of conduct for recaptors. There are several reasons. First, as indicated, we could uncover no evidence of abuse of the remedy. Second, we were concerned about the accessibility of such a code. There are two types or recaptors: secured lenders, and individuals trying to regain possession of their own property. A code of conduct would not likely come to the attention of the latter class of recaptors; if at all, it would probably come to their attention only after the recaption. Moreover, those private recaptors who did consult with solicitors would almost invariably be advised to resort to a judicial remedy[5]. Thus, it is our estimation that a code of conduct would be of no value in this class of recaption.

A better case can be made for a code which would control the methods of recaption used by institutional secured lenders. They would be aware of the requirements of such a code and enforcement proceedings would be practicable. Yet, our information is that, even here, such a code would have little utility. We were informed that, as a matter of policy, if recaption proves problematic for institutional lenders they resort to a judicial remedy, either for recovery of the goods or a judgment for the accelerated balance of the purchase price.

(d) Should the Recaptor be Required to Give Notice of the Recaption to the Recaptee?

(i) Introduction

At common law, there is no requirement in peaceable recaption cases for the provision of notice by a recaptor to a recaptee that he is about to take

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[5] This is the advice provided generally in several textbooks. See F.H. Lawson, *Remedies of English Law*, 2nd ed. (1980), at 28; *Stephen's Commentaries on the Laws of England* Vol. II, W. Crispin ed. (1950), at 458; and P.F.P. Higgins, *Elements of Torts in Australia* (1970), at 104-05. Indeed, it is even the advice provided in the Ontario Bar Admission Materials from time to time. See the Law Society of Upper Canada, *Creditor's and Debtor's Rights 1984-88*, Bar Admission Course Materials, at 120.

or has taken possession of the goods.[6] We considered whether the imposition of a notice requirement would be advisable and, for the following reasons, do not favour such a requirement.

(ii) Pre-Recaption Notice

A pre-recaption notice requirement could have several advantages. First, by alerting the recaptee, it would probably preclude the possibility of surreptitious recaption. Second, it would enable recaptees (who are frequently innocent of any wrongdoing other than defaulting on the debt) an opportunity to lessen the impact of the recaption by making alternative arrangements. Third, it may lessen the prospect of a violent encounter, for the recaptee will be made aware of the imminence of and reasons for the taking. The recaptee would likely respond by either surrendering the goods or taking steps to make recaption more difficult such as, frequently, moving or hiding the goods. Fourth, it would inform the recaptee of the imminent disappearance of the goods, forestalling the prospect of inaccurate reports of theft to the police. Finally, it could provide an opportunity to a recaptee having a claim of right to present his case to the recaptor, which may result in a settlement of the dispute acceptable to both parties.

It is our view that these advantages do not outweigh the costs and practical difficulties associated with the imposition of a pre-recaption notice requirement. In many cases the immediate consequences of the provision of notice would be to frustrate the remedy: if the notice must be given in advance of the recaption effort, the recaptee could employ means to render recaption impossible. Even if notice need only be provided at the time of the recaption we see the prospect of a hostile confrontation increasing in some cases; a significant benefit of a successfully surreptitious recaption is that it avoids the prospect of a violent or heated encounter. In addition, we have no information that leads us to believe that the police are bothered by recaptees whose goods have been taken. In fact, we are informed that it is the usual practice of secured creditors to notify the police after surreptitious recaptions. Moreover, in the vast majority of cases, being recaptions by secured lenders, the recaptee will know that he is in default or that the secured creditor believes him to be. There will invariably have been contact between the debtor-recaptee and the secured-party-recaptor in which the secured-party-recaptor has tried to induce payment.

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[6] Some cases suggest such a requirement where land will be entered under certain circumstances, such as in the context of inevitable accident: *Read* v. *Smith* (1836), 2 N.B.R. 288, at 294; or, where force will be employed, such notice to be in the form of a demand for the return of the goods: see *Devoe* v. *Long*, [1951] 1 D.L.R. 203 (N.B.S.C. (A.D.)). In *Traders Bank of Canada* v. *G. & J. Brown Manufacturing Co.* (1889), 18 O.R. 430 (Ch.D.) it is suggested that there may be a general notice requirement at common law, at least in secured transaction cases. However, the case stands alone in that regard. See D. Paciocco, "Personal Property Security Act Repossession: The Risk and the Remedy", in *Debtor-Creditor Law*[:] *Practice and Doctrine*, M.A. Springman and E. Gertner (1984), at 370-74.

The difference between secured-party-recaptors and individual recaptors is germane here just as it was in the context of a potential statutory code of conduct. To be worthwhile, a self-help remedy must be simple and straightforward. A recaptee who is not a secured lender would probably not know about a notice requirement. Moreover, consideration must be given to an appropriate sanction for cases where any required notice is not given. Invalidating the recaption would be unwarranted; that would only serve to prolong the sorting out of property rights. The imposition of a fine or a damage payment to a recaptee is equally inappropriate.

Providing the recaptee with an opportunity to present his case to a recaptor would, in most instances, have little utility other than discouraging recaption, even in cases where there is little or no substance to the recaptee's position. We prefer to impose the burden on the recaptor of being correct as to his entitlement, failing which the recaptee may resort to the property torts to obtain redress. In short, a pre-recaption notice requirement does not seem to be necessary, and it would serve to make the remedy much less simple and effective than it is.

(iii) Post-Recaption Notice

Post-recaption notice does not present the challenge to effective recaption that pre-recaption notice does, although it offers fewer of the advantages that pre-recaption notice can be seen to hold out. While it would serve to let the recaptee know what became of the goods, as already indicated, we could not determine that uncertainty over what happened to repossessed goods has presented a problem. Again, it is unlikely that individual recaptors would be aware of the requirement and, again, we face the difficulty of finding an appropriate response to non-notice recaptions. In any event, the *Personal Property Security Act, 1989*[7] provides that, prior to final disposition of collateral, the debtor must be notified. In addition, the statute provides a scheme to account for any interest a debtor may have in the item in question.[8] We conclude that in this jurisdiction, there is no apparent need for a pre-recaption or post-recaption notice requirement.

(e) The Ontario *Consumer Protection Act*[9]

As indicated in chapter 8, a limitation upon the peaceable recaption remedy applies in the context of consumer sales. It is no doubt intended by section 23(1) of the *Consumer Protection Act* that recaption not be permitted without leave of a court where two-thirds of the purchase price of a consumer good has been paid. We are concerned that, because section 62(a)

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[7] S.O. 1989, c.16.

[8] See *ibid.*, s.19 and Part V, being ss.55-62.

[9] R.S.O. 1980, c.87.

of the *PPSA* provides a statutory right of repossession, the protection of the *Consumer Protection Act* may be circumvented. The latter *Act* imposes its restriction by rendering unenforceable repossession rights contained in a contract or security agreement and does not seem to cover the statutory repossession right. We would recommend, therefore, that the application of the section 23(1) *Consumer Protection Act* provision to a *PPSA* security interest be clarified.

(f) Peaceable Recaption: Summary

In summary, then, we recommend that no bars to the remedy of peaceable recaption be erected. Since it is circumscribed by the restrictions of tort law and criminal law, there is no need to attempt to define peaceable recaption or to express that it is permissible. We do not recommend that its exercise be restricted by a statutory code of conduct, or by the imposition of a notice requirement, and we recommend that the application of section 23(1) of the *Consumer Protection Act* to *PPSA* transactions be made clear.

2. RECAPTION AND THE USE OF FORCE

(a) Introduction

Whereas the right to peaceable recaption is circumscribed by the property torts, the methods of recaption are not circumscribed clearly by the prohibitory rules of tort and criminal law. This is because the law has erected defences to certain of these prohibitory rules which confer justification on recaptors who engage in conduct that would be tortious or criminal if that conduct took place in a non-recaption context. As a general observation, it is our view that these justifications are too extensive. They give too much to the right to resume or obtain possession of chattels and too little to the need to minimize the prospects of violence during recaption. We believe that the recommendations contained elsewhere in this Study Paper improve the judicial remedies for interference with goods sufficiently to warrant judicial involvement where the prospect of peaceable recaption is not secure. Moreover, we note that many of the recommendations we are about to make correspond to the self-imposed practices of many major commercial lenders.

(b) Interference with the Person of the Recaptee

The Ontario position, that no force can be used against the person of a recaptee in the course of recaption, is preferable to the English position and that which seems to obtain in several of the other provinces. Quite simply, the recaptee's right to be free from unwanted physical contact, the prospect of an escalation in violence as a recaptee defends his possession or person, and the availability of court appointed relief, outweigh the right of a recaptor to immediate possession of his goods. The law should not condone the

application of force in aid of recaption. Given the relatively limited context in which the courts have articulated the ban on forcible recaption in Ontario, we see a need to clarify this position. We favour an express statutory articulation that no interference with the person is permissible in aid of recaption.

(c) The Defence of Peaceable Possession

In the context of the use of force in aid of recaption, it is important to consider the law with respect to the defence of peaceable possession of moveables. Most often a recaptee will be in peaceable possession and thereby justified civilly and criminally in using some force under some circumstances to protect that possession. Civilly, such a recaptee may employ reasonably necessary force against a wrongful taker.[10] In a criminal context, different degrees of force can be used, depending on the circumstances. If an accused recaptee without claim of right is defending peaceable possession against a trespasser, it is possible that no force may be used, although section 38(1) of the *Criminal Code*[11] seems to invalidate only "striking" or the causing of "bodily harm".[12] Where the trespasser persists, however, he is deemed to commit an unjustified assault.[13] This opens up the defence of self-defence to the person defending possession, pursuant to which he may repel the trespasser using no more force than is necessary to defend himself.[14] Where the person in peaceable possession has a claim of right to the property, however, he may defend his possession against a person entitled by law to possession of it, provided he uses no more force than is necessary.[15]

We recognize that both criminal and civil defences are necessary in the context of defending peaceable possession of goods. If these defences were not available, a person faced with an illegal demand by a recaptor or another would be required to accede where force was threatened, or risk criminal or civil liability. That prospect is easily rejected. Yet, both the interplay of the criminal law and the civil rules and the relationship between the defences of possession and recaption raise difficulties.

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[10] See A.M. Linden, *Canadian Tort Law*, 4th ed. (1988), at 75.

[11] R.S.C. 1985, c. C-46.

[12] The defence is conferred by s.38(1). In *R.* v. *Doucette*, [1960] O.R. 407 (C.A.), the Court leaves little doubt that the use of the words "strike or cause bodily harm" in describing forbidden conduct does not leave room for the application of other kinds of force. And see D. Stuart, *Canadian Criminal Law*, 2d ed. (1987), at 410, where the author sees s.38(1) as leaving no room for the application of physical force.

[13] *Supra*, note 11, s.38(2).

[14] S.34 provides the defence of self-defence and s.37 describes the degree of force permissible. See A.W. Mewett and M. Manning, *Criminal Law*, 2nd ed. (1985), at 401.

[15] S.39(1).

First, whereas it is appropriate to exculpate an accused in a criminal case where he acts under the honest but mistaken belief that he has a right to the subject goods, we do not feel that it is appropriate to extend civil protection to such a person for the employment of force against a recaptor having a legal entitlement to possession. As has been indicated above, in our view a recaptor's justification of even a peaceable recaption should depend upon his actually having a superior right to possession of the goods. It would be anomalous if a recaptee, with an inferior right to possession, had a civil defence exonerating the use of force where he was protecting his possession against an attempt of peaceable recaption. Rather, our view is that a recaptee using force to frustrate an attempted peaceable recaption should also bear the risk that he is incorrect in his assessment of his right to possession *vis-à-vis* the recaptor. The risk is, of course, exposure to civil liability to the peaceable recaptor resulting from the force used. Of course, where the recaptor uses force, the recaptee can avail himself, civilly, of the defence of self-defence to justify the force used to avoid the attempted forcible recaption. We feel that this provides sufficient protection to the recaptee where the recaptor is entitled to possession.

Even where a recaptee has, as against the recaptor, the right to possession of the goods, we wish to clarify the limitations that apply in terms of the degree of force the recaptee is permitted to use. The *Criminal Code* provisions vary in their description, but section 39 speaks of permitting no more force than is necessary. While it has not been so interpreted, that phrase suggests that there is no upper limit to the amount of permissible force. On such a reading, unreasonable force, such as knocking out a wrongful taker over a copy of a newspaper, would be justified, so long as knocking him out was necessary to protect the newspaper.[16] We wish to be clear that to be defensible civilly, force used in defence of possession must be both necessary and reasonable.

Finally, the interplay between recaption and the defence of possession is problematic. There is a fine and obscure line between defending peaceable possession and recovering or retaking goods the possession of which has already been lost to or taken by someone else. Section 38(1) of the *Criminal Code* reveals the problem since it recognizes that a person out of physical possession may still be "in peaceable possession" under some circumstances where the trespasser has actual physical possession.[17] Yet, the section provides no guidance as to when that will be, and the jurisprudence, both

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[16] In *R.* v. *Baxter* (1976), 27 C.C.C. (2d) 96 (Ont. C.A.), at 113, Martin J.A. indicated that there were limits, even under the *Criminal Code* provision. He indicated that the term "'necessary' required that the harm sought to be prevented could not be prevented by less violent means and that the injury or harm done, or...reasonably...anticipated from the force used is not disproportioned to the injury or harm it is intended to prevent".

[17] S.38(1)(b). See *Nikolyn* v. *The King*, [1949] S.C.R. 392.

criminal and civil, fails to mark clearly the boundary between peaceable possession and the re-acquisition of possession.

This lack of definition of the line between defending possession and retaking it presents problems of certainty. When is a recaptor attempting to rely improperly on the defence that he used force in aid of recaption, and when is he relying properly on the justification of force in defence of peaceable possession? When is a recaptee attempting to rely properly on a defence of peaceable possession, and when is he attempting improperly to justify the use of force to retake goods which have already been taken and possessed by a recaptor?

It is noteworthy that the defence of recaption grew out of the defence of possession of moveables. At first, it was available only in cases of momentary losses of possession where possession could notionally be said to continue. Then it was extended by the concept of "fresh pursuit."[18] So long as the dispossessed did not abandon, even temporarily, his efforts to resume possession, the thief was still considered to be in the process of taking, for his escape was not yet secure.[19] The result is that extending the defence of possession to recaption has obscured the dividing line between the recaptor's role and that of the recaptee. Who is defending peaceable possession and who is seeking to take it? Unfortunately, this problem has plagued the law for centuries and we do not find it susceptible of precise solution. Each case must turn on its own facts. Accordingly, we favour the continuation of a defence of peaceable possession and make no recommendation as to how peaceable possession is to be defined.

(d) Provocative Recaption

The final problem presented in the context of the use of force in aid of recaption is the ban on provocative recaption that is suggested by some authority. While we share the desire to eliminate the use of force during recaption, forbidding conduct which amounts to a "breach of the peace" or which is likely to cause a "breach of the peace" provides too unpredictable a standard to be helpful in articulating the outer reaches of the responsible use of this remedy.[20] In our view, discouraging force can best be accomplished, as stated above, by denying the recaptor the right to its employment, and by denying to a recaptee a civil defence in cases where he himself responds with force to an effort by the recaptor to peaceably take his goods. Therefore, we recommend that the proscription on the use of force by recaptors bear no reference to "breaches of the peace" or to provocative circumstances.

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[18] See Linden, *supra*, note 10, at 75.

[19] See Branston, *supra*, note 4.

[20] See the discussion of the concept of "breach of peace", *supra*, in the context of the American law of recaption *supra*, ch. 9.

3. TRESPASS TO LAND AND GOODS

(a) INTRODUCTION

The law respecting the right of a recaptor to enter the land of a recaptee is unclear. The traditional approach is to develop categories of cases in which such entries would be permissible and to erect appropriate preconditions to entry. For example, reasonably necessary damage appears to be justifiable where the recaptor causes it while retaking from a wrongful taker, but not where the recaptee is not responsible for the goods being upon his land, such as in the case of inevitable accident.[21] Another line of cases supports the right to enter the land of a recaptee, regardless of the nature of the recaptor's higher right to possession or of questions of fault, so long as no damage is done during the recaption to the land or buildings of the recaptee.[22] In other words, recaption is a defence to claims of trespass *per se* for nominal damages, but not to a claim for damages caused by the trespassory conduct of the recaptor. It is this latter position that we favour.

(b) THE CLASS OF RECAPTION SITUATIONS WHERE RECAPTION PROVIDES A DEFENCE TO TRESPASS TO LAND *PER SE*

Since we see recaption as a method of remedying situations where a recaptor is denied his right to possession by a recaptee, and since we do not endorse the justification of damage done during entry to the land of a recaptee, we favour the position that recaption be a defence only to a claim for nominal damages for trespass *per se* to land and buildings. Such defence would be available to any recaptor who has a right to possession of the subject goods superior to that held by the landowner or occupier. While questions of culpability of the recaptee are relevant where damage is being justified, this is not the case where temporary and inconsiderable invasions occasioned by a simple entry to land or buildings are involved.

(c) THE RECAPTION DEFENCE AND DAMAGE DONE TO THE PROPERTY OF THE RECAPTEE

Notwithstanding that at common law reasonably necessary damage to the land and buildings of a recaptee could be justified in some recaption categories, we favour denying the defence for such damage. First, we are persuaded of the need to reduce the potential for volatile recaptions. This potential inspired Ontario courts to recognize, as a possible form of bar to recaption, the fact that it is to be engaged in under provocative cir-

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[21] See *Read* v. *Smith*, *supra*, note 6.

[22] The leading case in this regard is *Anthoney* v. *Haney* (1832), 8 Bing. 186. See the discussion *supra*, ch.8.

cumstances.[23] As indicated, however, we do not feel that a general ban on provocative recaptions would be serviceable because of uncertainty. Yet, our belief that the law should discourage volatile recaptions when it can, and that recaptors should have recourse to judicial remedies where there is any likelihood of violence, argues against justifying damage done during recaption. The licence to do reasonable and necessary damage to the property of the recaptee can only encourage recaptors to be more aggressive in their techniques than if such damage were actionable. The imposition of liability would provide a clear standard with predictive value.

Since most recaptors are secured lenders who are quite able to assess unemotionally the use of force before or during recaption, and because we favour a remedial structure which will make the judicial remedies for recovery of goods more expeditious, we believe this position to be warranted. Moreover, we have less concern about the accessibility of this rule for individual recaptors than we had with a potential notice requirement or with a code of conduct for recaptors. We speculate that, even at present, individual recaptors are typically unsure of their rights insofar as the doing of damage is concerned. If that is so, where they proceed to do reasonable and necessary damage, they indicate a readiness to run the risk of responsibility. The effect of this recommendation is to make recaptors liable to the recaptee for any actual damage done to the land of the recaptee. However, the recaptor would retain a defence to an action for purely nominal damages. Because damage to the goods of a recaptee is equally as provocative as damage to his land and buildings, we also recommend that recaption not constitute a defence to liability for damage to goods, with the same saving in the case of actions for nominal damages.

4. DWELLING HOUSES

As chapter 8 indicates, the common law is uncertain as to whether recaption is a defence to a trespass action where a recaptor has entered a dwelling house without permission. We feel that such uncertainty should be resolved in favour of the sanctity of the dwelling house. Recaption should not provide a defence, even to trespasses *per se* to dwelling houses.

It is predictable that the greatest potential for violence will be presented by fact situations where the recaptor is seeking to enter a dwelling house without the freely given and contemporaneous permission of the recaptee. We feel that gaining entry to dwelling houses by trickery stands apart from using trickery to obtain recaption of chattels in other situations. There is a particular possibility of violence by the householder should the trickery be uncovered. Our recommendation is that a recaptor not be justified in entering a dwelling house except where he obtains informed authorization

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[23] See *R.* v. *Doucette*, *supra*, note 12; and *Stackaruk* v. *Woodward*, [1966] 2 O.R. 32 (C.A.), as discussed, *supra*, ch. 8.

at the time of entry. A recaptor who contravenes that restriction would expose himself to an award of at least nominal damages.

There are statutory definitions of dwelling house provided in other contexts, including the *Criminal Code*.[24] Section 2 defines dwelling house as follows:

> "dwelling-house" means the whole or any part of a building or structure that is kept or occupied as a permanent or temporary residence and includes
>
> (a) a building within the curtilage of a dwelling-house that is connected to it by a doorway or by a covered and enclosed passageway, and
>
> (b) a unit that is designed to be mobile and to be used as a permanent or temporary residence and that is being used as such a residence.

A "curtilage" is the area attached to and containing a dwelling house and its outbuildings.[25] Thus, an attached garage would be covered but an outdoor deck adjacent to a patio door might not be. A detached patio clearly would not form part of a dwelling house. But what of an attached garage with no internal connecting door? Would a garage connected to the house by an enclosed breeze-way be considered a dwelling house?

The term "dwelling house" has been judicially interpreted, with each interpretation responding to the context in which the decision was made.[26] We are concerned, however, that providing a statutory definition in the context of recaption could serve to exclude circumstances which should be covered by the entry bar, given the purpose of that prohibition. What is a dwelling house can best be decided by the courts on a case-by-case basis in such a way as to discourage potentially volatile recaptions.

5. INCREASING RECAPTION RIGHTS BY CONTRACT

We recommend that recaptors not be able to increase by contract their recaption rights beyond those provided here. This represents a partial reversal of the common law position. At common law, while a recaptor could not obtain contractual consent from a recaptee to commit an assault upon the recaptee during recaption,[27] recaptors could obtain licences to do damage to land, buildings or goods. Particularly in the context of security

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[24] *Supra*, note 11.

[25] *Oxford English Dictionary*. In *Fixel* v. *Wainwright* 492 F. 2d 480 (5th Cir. 1974) curtilage was defined as meaning the "yard, courtyard or other piece of ground included within the fence surrounding a dwelling house."

[26] See, for example, *Hudson* v. *Fletcher* (1909), 2 Sask. L.R. 489; *Paquet and Veino* (1978), 43 C.C.C. (2d) 23 (Ont. C.A.); *R.* v. *Henderson*, [1975] 1 W.W.R. 360 (B.C. Prov. Ct.); and *R.* v. *MacIntyre et al.* (1982), 69 C.C.C. (2d) 162 (Alta. Q. B.).

[27] See *R.* v. *Doucette*, *supra*, note 12.

agreements, where the vast majority of relevant provisions will be found, we believe that to allow contractual extensions of rights would render meaningless the restrictions on recaption that we recommend.

6. THE IMPACT OF OUR PROPOSALS ON CRIMINAL AND QUASI-CRIMINAL LIABILITY

We noted in chapter 8 that the recaption privileges at common law for tort liability purposes also control certain forms of criminal and quasi-criminal liability, most notably for entry to land. Our proposals to the extent they reduce those privileges would have a corresponding broadening effect on those forms of liability. We considered whether such an effect was desirable, and concluded that on balance it was not. It seems to us that our proposals would sufficiently control the forms of recaption with which we are concerned without the added criminal or quasi-criminal penalties. We would thus confine our proposals to civil liability.

CHAPTER 11

STRICT LIABILITY FOR WRONGFUL INTERFERENCE

1. INTRODUCTION

We have noted at various points in our discussion of the present law that the major remedies for wrongful interference with goods are considered to be vindicatory. This is in part because it is irrelevant that the defendant believed, in good faith and on reasonable grounds, that he had the right to do what he did. It can be argued that, particularly where liability in conversion is concerned, this can bear hard on a defendant, especially a consumer. The case we particularly noted was that of a consumer who acquired stolen goods and who later resold them or traded them in on other goods. The consumer would be liable for the value of the goods to the true owner, either for the conversion in the acquisition or for the conversion in the resale or exchange, at the least.

The English Law Reform Committee[1] considered this issue at some length, contrasting French law. Under that law as it was explained to the Committee, the owner of goods has a remedy for restitution against the wrongful possessor. But the owner only has a claim, in damages, against an intermediate handler of the goods who had acted in bad faith or without care, as in the investigation of title on a purchase.

The Law Reform Committee after considering the matter at some length concluded that there was not a sufficient case for changing the common law. They marshalled some strong arguments against change. But we would urge that a better regime than present law can be designed that can meet the Committee's concerns. We put forward the analysis by which we arrived at this design in this chapter, and we also consider the features of the design in some detail. We begin by looking at our case of a purchaser of stolen goods in a little more detail.

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[1] *Eighteenth Report (Conversion and Detinue)* Cmnd. 4774 (1971), paras. 10-15.

2. THE IMPACT OF STRICT LIABILITY

The situation of theft was chosen for illustrative purposes because there are no exceptions there to the principle which protects true owners, *nemo dat quod non habet*. In fact, virtually all of the *nemo dat* exceptions focus on the initial dealing with the true owner. If that dealing does not engage an exception, subsequent dealers are exposed to conversion (or detinue) liability[2] regardless of the quality of their dealings, or of their means of knowledge of those dealings. If the initial dealing does engage an exception, all subsequent dealers are protected, because the exceptions operate on title. Thus, no distinction in either case is drawn between subsequent dealers by reference to their knowledge or means of knowledge of the involuntary loss of title.[3]

It was this all or nothing effect of the *nemo dat* principle and its exceptions, when coupled with the true owner's remedies in conversion and detinue, which would appear to bear particularly hard on consumers. This was because consumers as a group are likely to be the least well equipped of all defendants to appreciate the risk of liability in this area, to make inquiries to protect against it even if it is appreciated, and to bear the loss, or to insure against it, if the risk befalls them.

3. ARGUMENTS FOR THE PRESENT LAW

In response to this, it can be forcefully suggested that the common law's balance between security of property and security of transactions should not be disturbed. The Ontario Law Reform Commission had occasion in its *Report on Sale of Goods*[4] to re-examine that balance as it is exemplified by the *nemo dat* principle and its exceptions. The Commission concluded that the present position should be retained, subject to some modifications in the exceptions.

It seems to us, however, that that conclusion does not end the matter. That is because it is possible to envisage a regime which does not operate on title, but which treats separately each defendant asserting a claim of right. One possible regime we considered would restrict present conversion liability to defendants in possession, while making intermediate dealers or handlers liable only if the plaintiff could show "fault". This is essentially the civil law regime, in France and in Quebec.[5] We note that this regime

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[2] This is subject to limitation defences.

[3] Rather, the major concern in the area of the exceptions to the *nemo dat* principle is with the conduct of the true owner: see Ontario Law Reform Commission, *Report on Sale of Goods* (1979), Vol. II, ch.12.

[4] *Ibid*.

[5] Which embody to varying degrees the principle the Ontario Law Reform Commission ranged against the *nemo dat* one, *possession vaut titre*, in *ibid.*, at 306-08; and see R.A.

assumes that the plaintiff continues throughout to have title.[6] This regime seemed attractive to us precisely because it enabled a court to protect a private person dealing in goods.

We note that in the Ontario Law Reform Commission's *Report on Amendment of the Law of Contract*[7] it considered again the same objection as the one we are considering, in the context of a scheme of apportionment for one or more *nemo dat* exceptions. That scheme had been put forward for discussion purposes in the Commission's *Report on Sale of Goods*[8] and subsequently adopted in the *Uniform Sale of Goods Act* of the Uniform Law Conference of Canada.[9] In the Commission's *Report on Amendment of the Law of Contract* it concluded, with regret, that an apportionment power would raise as many difficulties as it would solve. Further, an apportionment power would be quite inconsistent with the security in transactions principle that underlay many of the *nemo dat* exceptions.

We consider, however, that reasonable distinctions can be drawn between the context discussed in that Report, being cases where a *nemo dat* exception applies, and the context of this Study Paper where no *nemo dat* exception applies. Here we are dealing with a situation where the common law's primary principle of security in title is concerned. Absent a *nemo dat* exception, no account is taken of the equities arising out of the conduct of the defendant or a predecessor in title. Where a *nemo dat* exception (present or proposed) is found to apply, it can be seen that in effect account has been taken of the equities arising out of the conduct of the true owner and of the equities arising out of the conduct of the defendant.

That is, it seems to us plausible to view the *nemo dat* exceptions as resting on the result of such an accounting in the specially defined cases to which the exceptions apply.

On the basis of this analysis it seems to us that the accounting of the equities called for by any proposal to change the strict liability of present law would raise issues of relief against hardship, or of fairness, that do not arise in the contexts where *nemo dat* exceptions apply. We thus consider that the analysis in the *Report on Amendment of the Law of Contract* does not determine the result here. However, there is another suggested feature of present law that would seem to argue against change of the sort we are here considering.

Macdonald, Ontario Law Reform Commission Research Paper IV, *Remedies for Wrongful Interference with Corporeal Moveables in Quebec* (1983), at I-18 to I-21.

[6] There is a full analysis of the remedies in Quebec in Macdonald, *supra*, note 5, especially at II-3 to II-39 and II-50 to II-64.

[7] *Report on Amendment of the Law of Contract* (1987), at 269-70.

[8] *Report on Sale of Goods* (1979), Vol. II, at 285-88, and Vol. III, Draft Bill, s. 6.4(3).

[9] The Act is set out in Alberta Institute of Law Research and Reform, *Report No. 38, The Uniform Sale Of Goods Act* (1982). The relevant section is s. 6.4 (3).

This objection to any substantial interference with present law along the lines of the civil law regime described by us is the complication it would add to title litigation. This objection is weightiest for cases where the plaintiff could not find the current possessor. The plaintiff would then have to prove fault on the part of the defendant-intermediate handler. As the English Law Reform Committee noted in its *Eighteenth Report* where it considered the same point, this could remove the current law's stern injunction to handlers to behave with the utmost circumspection.[10] It could also increase the volume of title litigation, which as we noted at the outset of this Study Paper, is now quite small.

We do not believe that this objection is insurmountable. We see no evidence that there is a significantly greater volume of title litigation in Quebec, which has a remedial scheme like the one being considered here, than that under present law in Ontario. We are taken by the concerns about dishonesty and complication, but believe they can be dealt with. Perhaps the simplest way of doing so would be to place the burden of proof on the fault issue on the defendant, and make the defence unavailable for merchant defendants, such as dealers in merchandise or auctioneers. Merchant defendants appear to make up the majority (although not a large one) of the defendants in present title litigation. They are also likely to have significantly better loss-bearing abilities than other defendants.

We elaborate our proposal in what follows. We note that the final result is more complicated than present law, or even than the civil law regime first considered. But we consider that our proposal would much enhance the fairness of present law without undue cost.

4. A PROPOSAL TO CHANGE THE PRESENT LAW

(a) A Defence of Lack of Fault

We would propose that defendants in cases of wrongful interference with goods should have the defence that they reasonably believed they could do what is complained of. This defence would generally speaking be restricted to liability of what is now the conversion or detinue type. That is to say, it would be restricted to cases where the defendant behaved as he did because he believed he or the person for whom he acted had a good claim to certain legally recognized rights in or to the goods in issue.

Thus, the defence would not avail a defendant who, say, in drilling a hole in his back yard damaged the plaintiff's telephone cable.[11] Nor would it avail a private boat owner who had put the plaintiff's goods ashore, now

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[10] See Cmnd. 4774 (1971), para. 14; and see J. G. Fleming, *The Law of Torts*, 7th ed. (1987), at 51 (source of quotation).

[11] Compare *Bell Canada* v. *Bannermount Ltd.*, [1973] 2 O.R. 811 (C.A.).

facing a claim of the trespass type.[12] In the first case the defendant would be asserting no interest in the cable. In the putting ashore case, the defendant might be suggesting he had the right to do what he did. But it is likely he would not be founding that right on any interest in the goods. Even if he were, if no such interest were known to the law, he should fail. The unfairness at which our proposal is directed is substantial liability for handling of or dealing with goods as incident to what would otherwise be a legally recognized interest in them.

To make out the defence, the defendant would have to show why he believed he had the interest he claimed. It should not be enough for the defendant to show he did so believe. Thus, a defendant who acquired goods at an extreme discount from an unlikely source of supply—say, a word processor from a stranger at a 75% discount—would have a nearly impossible burden to discharge. A defendant who acquired goods at market price from a regular source of supply would, unless he had special means of knowledge, have a fairly easy burden to discharge. Between these two extremes, various combinations of price and other terms and the context in which the transaction was concluded can be imagined, altogether apart from questions raised by what the defendant knew or was in a position to know.[13] We think it important to reiterate that the burden throughout remains on the defendant. The importance of our proposal is that it gives him an opportunity to shoulder this burden which present law denies.

(b) Excepting "Merchants"

We consider that private consumers make the most compelling case for such an opportunity, as we have explained. We note that, in the Empirical Survey undertaken for this Study Paper, consumers' organizations were given an opportunity to express opinions about the present law.[14] They did not express any views about title litigation in this or any other respect. Considering the current volume of title litigation, and the greater immediacy of issues like product safety,[15] we are not surprised at this.

We do not think that "merchants" present a compelling case, as we have explained. We would define "merchant" as the Ontario Law Reform Commission's proposed sale of goods legislation does, as a person

(a) who deals in goods of the kind involved in the transaction;

(b) who by his occupation holds himself out as having knowledge or

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[12] Compare *Fouldes v. Willoughby* (1841), 8 M. & W. 540, 151 E.R. 1153.

[13] It follows that in certain circumstances a duty of inquiry may be raised.

[14] See K. Hildebrandt and P. Mercer, Ontario Law Reform Commission Research Paper V, *Incidence and Patterns of Preference* (1983), at 16 and 62.

[15] See the Ontario Law Reform Commission's *Report on Products Liability* (1979).

skill appropriate to the practices or goods involved in the transaction; or

(c) to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.[16]

For this group, as the English Law Reform Committee put it in its *Eighteenth Report*, the risk of liability of the conversion or detinue type is likely to be incidental to their business, and is also likely to be the subject of insurance.[17]

We note that this would not be true simply because goods could be said to be acquired in the course of a business. Thus our defence should be available to a consumer acquiring a home knitting machine to earn money under a home knitting arrangement.[18] Such an arrangement would not be covered if the exclusion were simply for acquisitions for the purpose of a business.[19] We considered more difficult cases still, of farmers, doctors and lawyers. These might seem to show that the "merchant" exclusion would produce much litigation.[20] We concede that a significant amount of the title litigation under our proposal may be in significant part concerned with the scope of the exclusion. But we think the problem is overstated. As the Ontario Law Reform Commission noted in its *Report on Sale of Goods*, definitions like this one in *Uniform Commercial Code* jurisdictions, from which this one comes, or in Ontario, which has statutes employing like ones, do not appear to have given rise to appreciable problems.[21]

We considered whether the exclusion should be restricted to the first merchant to appear in a chain of transactions by which the goods left the true owner. We concede that the first merchant would likely be in the best position to know that the goods had been wrongfully interfered with, and that a restriction might prevent duplication of effort in title inquiries. We do not consider, however, that the first point will always hold, while the second seems unlikely to, given that a merchant would not be able to make out any lack of fault defence he were allowed simply by showing he bought from

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[16] See Draft Sales Bill, s.1.l(1)18 in *Report on Sale of Goods*, *supra*, note 8, Vol. III.

[17] See Cmnd. 4774 (1971), para. 48.

[18] Cf. G. Wallach, *The Law of Sales under the Uniform Commercial Code* (1981), at I-24 to 27 (on "merchant" under the *Uniform Commercial Code*).

[19] Compare the definition of "buyer" in *Consumer Protection Act*, R.S.O. 1980, c.87, s.1 (d).

[20] For the case law in the United States on farmers, see Wallach, *supra*, note 18, at 1-24 to 27.

[21] *Report on Sale of Goods*, *supra*, note 8, Vol. 1, at 39. We note the split in the authorities on farmers discussed by Wallach, *supra*, note 18, but consider the problem not to be worrisome.

another merchant. In any event, any duplication of effort under our proposal occurs now, and has the benefit of helping to prevent the formation of chains of transactions away from the true owner. In our view, merchants as a group are better placed than any other group of defendants to prevent such chains forming or continuing.

(c) Defendants in Possession

The scheme we have just described gave us greatest concern in relation to defendants still in possession of the goods. It seemed hard to say to a true owner that he cannot get goods back from another person enjoying them because, although the latter does not have title to the interest he claims in them, he had a reasonable belief that he acquired a good claim to that interest. We note that Quebec and French law would not permit the defendant such a defence in this situation.[22]

On the other hand, this exclusion of the defence produces the possibility of inequitable distinctions between defendants. Consider a consumer who acquired an automobile from another consumer who had used it for five years. The bulk of the value of the goods may have been realized by the intermediate handler, while the possessor may have had them for only a very short time before the true owner appears to demand them back.

One response to this point which we considered was to restrict the defence still further, to permit a plaintiff to "waive the tort" and seek physically identifiable proceeds in the hands of a defendant no longer in possession, without any lack of fault defence for that defendant. Such restitutionary claims are possible under present law, and would cover such things as money the defendant received on a resale and had not disbursed.[23]

However, this last idea seemed to substantially renege on the defence itself as well as to introduce inequitable distinctions of its own. One example would be the distinction it would force one to draw between a person who used a car for virtually all of its useful life and gave it to her son, and a person who used it for a much shorter period before reselling it.

We favour a solution whereby the lack of fault defence would be available to all non-merchant defendants whether or not they are in possession. However, making out the defence would not prevent an order for recovery *in specie*. But any such order would only be on terms that the plaintiff reimburse the defendant the lower of the price he paid for the goods or their value at the date of return. Something similar to this was proposed in the Ontario Law Reform Commission's *Report on Sale of Goods* as a

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[22] See the references in notes 5 and 10, *supra*.

[23] On restitutionary remedies of this sort, see references in ch. 3.

possible condition of an order for courts to make for the true owner when certain *nemo dat* exceptions were made out.[24]

However, by contrast with the earlier proposal, here we would not envisage leaving any judicial discretion in the matter. This is because title is *ex hypothesi* with the true owner, who is seeking the goods back from an innocent private party. It seems to us to be one thing to allow a court a discretion to make an order like this one where, by reason of conduct of the true owner, an involuntary loss of title may be involved. It is another to leave the matter at large where there is no question of such loss, but rather vindication of the true owner's interest.

(d) Recaptions

A solution to the problem of the defendant in possession such as the one we have proposed raises an obvious question where the true owner uses self-help rather than judicial process to regain his goods. It may be suggested that it is one thing to refuse to allow an action to produce unfairness, and another to refuse to correct an unfairness brought on by events.[25]

We were not taken by this point, however. Recaption is bound up in the extent to which the law permits a defence in any subsequent proceedings for otherwise unlawful conduct. Further, we do not see why the law should discriminate against the person who decides to concede the plaintiff's claim of title rather than force title litigation. And it seems to us that further inducements to self-help are not appropriate.

Thus, we would give a non-merchant who has lost goods through a recaption an affirmative claim against the recaptor for the lesser of the price paid for the goods or their value, if the claimant can make out the defence of lack of fault.

(e) Defence to Claims for Contribution or Indemnity

There is a related question. It involves a situation where more than one person is liable for the same conversion (a sale, say), or for multiple conversions down a chain of dealings. Such a situation would be common. What if one defendant is successfully sued, and turns around to seek contribution or indemnity from another person who, if he had been sued, would have had the lack of fault defence? The obvious case would be a buyer seeking damages from his seller for breach of the obligation to have the right to sell. Another case would be an action for contribution between tortfeasors, an action which we suggest below should be possible.

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[24] See *Report on Sale of Goods*, *supra*, note 8, Vol. II, at 313-14.

[25] See in a different context A. Weir, "Doing Good by Mistake—Restitution and Remedies" (1973) 32 Camb. L. J. 23, at 26.

The contribution case is easiest, it seems to us. The person who would have been immune for this reason if sued directly should not be liable if sued for contribution. This type of principle is a well accepted part of the law of contribution which does not seem to us to be problematic here.[26]

The claim over based on contract is more troublesome. On the one hand, permitting the claim would seem to open up the possibility, particularly in standard form contracting on the buyer's terms, for undermining the scheme proposed here. One such standard form contracting situation would be where a consumer trades in an automobile to a dealer on a new car. On the other hand, to give a consumer a defence to any claim over based on this ability to make out the lack of fault defence would seem to vary the contract without subjecting it to any of the traditional approaches for reviewing contract terms for unfairness. In the Commission's *Report on Sale of Goods*, in fact, it suggested an implied term as to title which on this view would be varied to the extent of allowing suitably qualified defendants this defence.[27]

In the end, we concluded that the defendant in a claim over in contract should be in the same position as a defendant in a contribution claim. It does not seem to us to be appropriate to view non-merchant sellers to be promising more than that they have the right to sell; but this is subject to the possibility of title defects for which they will bear the burden of showing they reasonably believed those defects did not exist. It seems to us that the Commission's *Report on Sale of Goods* did not directly address the question of consumer sellers so much as it addressed the position of the buyer and the seller who explicitly disclaimed.

5. THE CHARACTER OF THIS PROPOSAL

There is no doubt that of all the proposals to change present law considered in our Study Paper, this one excited the greatest debate, and produced the strongest divisions of opinion among those exposed to it.[28] We believe it is important to realize that what has been regarded as a basic feature of present law is here proposed to be changed significantly, and that further debate would be most useful. Equally we believe that our proposal addresses a substantial concern, and is worth debating.

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[26] See Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (1988), at 117-39, 140 (recommendation 3).

[27] See *Report on Sale of Goods, supra*, note 8, Vol. II, at 195-201.

[28] We note in particular the intensity of the argument that the *idea* of a property right is that there is strict liability for interference. But it seems to us that the premise cannot withstand analysis: see Perry, "The Impossibility of General Strict Liability" (1988), 1 Can. J.L. & Juris. 147, at 151-52.

CHAPTER 12

THE *JUS TERTII* DEFENCE: THE TITLE OF ANOTHER

1. INTRODUCTION

In chapters 2 and 3 we noted that a plaintiff suing for wrongful interference with his actual possession cannot be met with a claim by the defendant that a third party exists with a right to immediate possession superior to the plaintiff's. However, a plaintiff not so suing can be met by such a claim.[1] Thus, where the plaintiff is relying on his right to immediate possession, and *a fortiori* where he is relying only on a reversionary interest, the defendant is not precluded from raising the claim.

However, there is some dispute among the authors concerning cases where the plaintiff is relying on his prior actual possession to show his right to immediate possession. The better view here is probably that it is a defence to show that there is a third party with a right to immediate possession superior to the plaintiff's.[2]

There is an exception to the conditions for the availability of the defence for some bailees being sued by their bailors, as we shall see.

There is also a damages implication to the *jus tertii* rules. A plaintiff relying on actual possession is entitled to recover as if he were owner, although his interest may be less than that. There is an exception to this, where the holder of a limited interest sues someone with a different interest.[3]

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[1] But see text at and references in the next note for a qualification of the statement in the text. Further, the *jus tertii* defence may be available where the plaintiff is relying on the extended meaning of actual possession discussed in the trespass context in ch. 2: see N. Palmer, *Bailment* (1979), at 123-24.

[2] See A. Jolly, "The Jus Tertii and the Third Man" (1955) 18 Mod.L.Rev. 371, replying to P.S. Atiyah, "A Re-examination of the Jus Tertii in Conversion" (1955) 18 Mod.L.Rev. 97; see also *Clerk & Lindsell on Torts*, 14th ed., A.L. Armitage & R.W.M. Dias eds. (1975), para. 1145; and *Winfield & Jolowicz on Tort*, 11th ed., W.V.H. Rogers ed. (1979), at 458. U.S. law apparently is more consistent with Professor Atiyah's view: see 66 *Am.Jur. 2d* (1973), Replevin, sec. 167. This debate does not extend beyond the case stated in the text, however.

[3] See Palmer, *supra*, note 1, at 182-86. It seems probable that e.g. a bailee could not recover the whole value if his bailor objected: *Salmond on Tort*, 15th ed., R.F.V. Heuston ed. (1969), at 755. We propose to have this made clear more generally: see below.

The preclusion of a *jus tertii* defence has, as we have seen, the objective of avoiding scrambles for possession. The rule also has the value of avoiding multiplicity of actions, particularly when account is taken of the damages implication. The rule has, however, been subjected to heavy criticism. We now canvass what appear to be the main issues.

2. SHOULD THE *JUS TERTII* DEFENCE BE AVAILABLE IN ALL WRONGFUL INTERFERENCE ACTIONS?

The major criticism of the preclusion arm of the *jus tertii* rules is the possibility of double liability it opens up. It is clear that payment of damages in the value of the chattel or delivery of the chattel, under legal process or voluntarily, to a plaintiff who had actual possession as a dispossessor or as a finder, will not bar a claim by the true owner against the defendant in detinue or conversion.[4] It has also been suggested that the defendant in such circumstances lacks a restitutionary claim against the original plaintiff.[5]

There is an exception to the position we have just described. It is where the original plaintiff was a bailee relying on actual possession: his suit does preclude a subsequent one by the bailor, except where the bailee recovers for no more than his own loss.[6] However, the bailee must account to the bailor for any amount over the value of the bailee's interest.[7] The problem with this exception is that the bailor cannot intervene in the bailee's suit.[8] Of course, the bailor does have a claim against the bailee. But this requires the bailor to abide the litigation management resources, honesty and solvency of the bailee. We agree with the view that it does not follow from entrustment of the goods that the bailor trusts the bailee for the whole value of them.[9]

The English Law Reform Committee in its *Eighteenth Report* agreed with the basic criticism of the preclusion rule. Their solution, subsequently

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[4] *Attenborough* v. *London and St. Katharine's Dock Co.* (1873), 3 C.P.D. 450, at 454. The position is otherwise under the *Rest. 2d Torts* (1965), sec. 895, which is discussed below.

[5] See J. Fleming, *The Law of Torts*, 5th ed. (1977), at 66. In any event it seems clear that the successful plaintiff would be liable to the *true owner* on a restitutionary basis: see S. Hedley, "The Myth of Waiver of Tort" (1984) 100 L.Q. Rev. 653, at 663-64.

[6] See Palmer, *supra*, note 1, at 190. The principle may apply to a bailor's recovering; but it is not clear if a bailor not in possession can recover for the bailee's interest also: *ibid.*, at 190, 182-86. It is possible that the principle applies to other limited interest situations: see English Law Reform Committee, *Eighteenth Report (Conversion and Detinue)* Cmnd. 4774 (1971), para. 57.

[7] *The Winkfield*, [1902] P. 42, at 60.

[8] Cmnd. 4774 (1971), para. 58. This rule applies except where interpleader proceedings are involved or the defendant has obtained the second plaintiff's authority to defend on his behalf: *ibid.*

[9] See E. Warren, "Qualifying as a Plaintiff in an Action for Conversion" (1936) 49 Harv. L. Rev. 1084, at 1096-97.

implemented with some modifications in the *Torts (Interference with Goods) Act 1977* and related rules of practice, was to let the defendant plead the *jus tertii* whenever he wished.[10] They then elaborated upon this solution in an effort to take account of the basic virtues ascribed to present law. We would commend their solution and, with some modifications, their elaboration of it.

One alternative to the English solution which we considered corresponds to the American position in the *Restatement Second Torts*. This is to preclude the *jus tertii* defence altogether; but once judgment is satisfied, the *tertius* is barred against the defendant, and left to a claim against the successful plaintiff.[11]

However, we favour a regime in which strong provisions for resolution of title disputes without multiple litigation are made,[12] and in which true owners are not precluded from suing wrongdoers without at least some sort of opportunity to join the litigation. For us, these are two of the prime features of the English proposals. The *Restatement* approach is justified in terms of an emphasis on possession and possessory title.[13] But we do not find this compelling in light of modern conditions and the features we have commended.

3. IDENTIFYING THE *TERTIUS*

Under present law, the *jus tertii* defence requires that the defendant identify the *tertius*.[14] The Law Reform Committee's solution would also require this, although the *Torts (Interference with Goods) Act 1977* is unclear on the matter. We prefer the Committee's solution, on the basis that the defendant not relying on his own position should at least be expected to abide the possible joinder of the *tertius*. Otherwise, the defendant is afforded an opportunity to abuse his position and to prolong the litigation unreasonably.[15] The Committee's proposal in this respect significantly reduces but does not eliminate the possibility of such prolongation. We would agree with the Committee, however, that the possibility of interlocutory relief and the court's general power to control abuse of its process are sufficient additional protections.[16]

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[10] Cmnd. 4774 (1971), para. 60. The matter of the damages implication of the rule is returned to later.

[11] *Rest. 2d Torts* (1965), sec.895.

[12] We note in this regard that *Rest. 2d Torts* (1965), sec.895, comment g says that a court can in a proper case stay an action until the *tertius* has been notified and afforded an opportunity to protect his position, such as by intervening.

[13] Sec.895, comment d.

[14] See Jolly, *supra*, note 2, *passim*.

[15] See Winfield & Jolowicz, *supra*, note 2, at 458.

[16] Cmnd. 4774 (1971), paras. 67, 97.

One problem with the identification rule is that under present law a plaintiff relying on actual possession need not disclose details of the circumstances under which he gained possession. Where he relies on a right to immediate possession, he must give particulars of his title.[17] The Committee recommended, and the English Rules of Court now provide, that the plaintiff always be required to give particulars of his title, and that the plaintiff must identify any person who, to his knowledge, has or claims any interest in the goods.[18] We would commend this position also.

4. JOINING THE *TERTIUS* AND DOUBLE LIABILITY PROBLEMS

This solution thus far would do nothing about a possible multiplicity of proceedings unless the *tertius* were permitted to join the action. The Committee proposed that, unless the court otherwise ordered, the *tertius* should be notified. If he did not join the proceedings, or disclaimed an interest, the defendant apparently could not rely on his interest.[19] But by the same token the *tertius* should then be barred from proceeding against the defendant.[20] The *tertius* should have a claim against the plaintiff, however.[21]

Where the defendant could not arrange for notification of the *tertius* (as where his identity was not known), and dispensation with notification was inappropriate, the Committee proposed that the *tertius* should not be barred from suing the defendant.[22] If the defendant, who would not here have a *jus tertii* claim, were sued twice for the same loss, he should be permitted to join the original plaintiff in the second proceeding, or to proceed against him in a subsequent action.[23] And again the *tertius* should himself be able to sue the plaintiff.[24]

In general terms, subject to making them consistent with Ontario's Rules of Civil Procedure, we would also commend this set of proposals.[25] The *Torts (Interference with Goods) Act 1977* and the rules of court under it offer some further elaboration. The only elaboration which we think it important to note here is in the rules of court, which authorize but do not require the court to deprive a *tertius*, who is notified but fails to appear on a

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[17] *Ibid.*, paras. 68, 69.

[18] *Ibid.*, paras. 69, 70; and Rules of the Supreme Court 1988, O.15, r.10A.

[19] Cmnd. 4774 (1971), para. 66.

[20] *Ibid.*, *loc. cit.*

[21] *Ibid.*, para. 76.

[22] *Ibid.*, para. 66.

[23] *Ibid.*, paras. 63-65.

[24] *Ibid.*, para. 76.

[25] See our proposed *Remedies for Wrongful Interference with Goods Act*, ss.6-8.

defendant's summons for directions or to comply with any directions, of any right of action against the defendant, either unconditionally or subject to such terms and conditions as may be specified.[26] We think such a discretion is useful, as where a *tertius* is out of the jurisdiction, and should be included as part of these proposals.

We disagree, however, with one feature of the Committee's proposals. This was to retain the present rule that where a bailee recovered the full value of the goods the bailor would be barred from suing the interferer.[27] Of course the *jus tertii* proposals so far would reduce the importance of this. But circumstances can be imagined where they would not otherwise bar the bailor. Such circumstances would include where the bailor initially cannot be identified or initially cannot be found, under conditions where substituted service or dispensation with service would be inappropriate.

In our view only where the bailor has authorized action by the bailee on his behalf or otherwise accepted the risk of such action should the bailor be barred. However, in these circumstances the defendant should be able to argue that payment to the bailee was payment to the bailor, on agency law principles. We note that the *Torts (Interference with Goods) Act 1977* does not appear to allow an exception for bailments or otherwise.

5. EXCLUDING THE DEFENCE BY AGREEMENT

The Law Reform Committee apparently did propose to abolish the rule whereby a bailee was estopped in a suit against him by his bailor from disputing his title, as by pleading the *jus tertii*.[28] The *Torts (Interference with Goods) Act 1977* made no exception to its regime in this case, which suggests it may have implemented the recommendation.

The rule in present law when more closely examined seems to us to be based on (implied) agreement. Thus, the estoppel does not apply in cases of involuntary bailment,[29] or in cases of finance leases.[30] We consider that the defendant's ability to plead the *jus tertii* should be subject to any agreement express or implied between the parties.

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[26] Rules of the Supreme Court 1988, O.15, r.10A(4).

[27] Cmnd. 4774 (1971), para. 76. There is no clear set of reasons the Committee puts forward for this.

[28] Cmnd. 4774 (1971), para. 66. Again the Committee gave no clear set of reasons for this preference.

[29] See *Fournier* v. *McKenna* (1921), 57 D.L.R. 725 (N.S.S.C.), discussed in Palmer, *supra*, note 1, at 174.

[30] Palmer, *supra*, note 1, at 164.

6. RECOVERY OF VALUE OF THE GOODS

The Law Reform Committee proposed that persons with rights to immediate possession, as well as persons with actual possession, should be able to recover damages as if they were owner. For both types of plaintiff this was unless it could be shown that a person asserting an interest in the goods objected to the plaintiff's recovering damages on that person's behalf.[31] However, the *Torts (Interference with Goods) Act 1977* did not implement this proposal.

We consider the Committee's proposal to be generally a sound one. The common law's distinction between actual possession and a right to immediate possession makes insufficient sense in this context. While the distinction may be intelligible in terms of the degree of the plaintiff's connection with the goods, it is not clear to us that a physical possessor will always (as where he knows he has no title) be as concerned about interferences with the goods as the person with a right to immediate possession. We would make one modification of the Committee's proposal, however: where the Committee would have permitted any person who simply asserted an adverse claim to object to recovery on the former's behalf, we would require that the objector be shown to have the interest he was asserting.

We would note that the principle we are proposing here is more limited than the one we proposed for recovery *in specie*. There we would allow even the holder of a reversionary interest to obtain such recovery. However, there the court would have a discretion which would not exist in the present context. And money has a greater susceptibility to dissipation than virtually all goods for which recovery *in specie* is likely to be sought. As in the recovery *in specie* context, however, we would make a plaintiff who recovered an amount greater than would otherwise be justified by the nature of his interest a bare trustee for the others entitled. We note that under present law a bailee holds any excess he recovers under a duty to account for it to the bailor.[32]

Finally the Committee would allow any plaintiff to recover, as well as damages for interference with his own interest, damages for interference with that of another from whom the plaintiff has authority in writing to make such a claim.[33] Again the *Torts (Interference with Goods) Act 1977* does not implement this. Again we think the Committee's proposal a sensible one which we would commend for adoption in any package of reforms in this area.

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[31] Cmnd. 4774 (1971), para. 73. See also note 3, *supra*.

[32] *Supra*, text at note 7.

[33] Cmnd. 4774 (1971), para. 73.

CHAPTER 13

CONTRIBUTORY FAULT AND CONTRIBUTION IN WRONGFUL INTERFERENCE ACTIONS

1. INTRODUCTION

The matter of how it is relevant to a defendant facing a claim for his wrongful interference that the plaintiff was careless in dealing with his own goods, and that others are liable for the same wrongful interference or for other wrongful interferences in the chain of transactions leading to the defendant, is surprisingly unclear under present law.

As the English Law Reform Committee in its *Eighteenth Report* clearly recognized,[1] the matters of contributory fault and contribution are related. If the right of the defendant to have his damages liability reduced or eliminated for the plaintiff's contributory fault is to be recognized, it does not make sense to ignore the fault of others in the chain of transactions which caused or contributed to the defendant's loss.[2]

In this chapter we consider present law on both subjects, contributory fault of the plaintiff, and contribution. We have drawn heavily on some of the analysis in the Ontario Law Reform Commission's *Report on Contribution Among Wrongdoers and Contributory Negligence*.[3] We commend the application of the scheme proposed in that Report. In our discussion of our recommendations, we elaborate on the wrongful interference dimension of that scheme in rather more detail than does that Report.

2. CONTRIBUTORY FAULT IN WRONGFUL INTERFERENCE ACTIONS

(a) INTRODUCTION

The question here is whether the plaintiff's carelessness in the custody or other conduct in relation to goods in which he has an interest should

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[1] *Eighteenth Report (Conversion and Detinue)* Cmnd. 4774 (1971), para. 81.

[2] See also English Law Reform Committee, *Twelfth Report (Transfer of Title to Chattels)* Cmnd. 2958 (1967), paras. 8-12.

[3] Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (1988).

affect his remedies for interference with them. A 1950 New Zealand case is illustrative. There the plaintiff left her handbag containing N.Z. £422 on a counter in the defendant's store.[4] The store subsequently handed the purse to a third party from whom relatively little identification was demanded, and the store was sued for conversion. The New Zealand Court of Appeal reduced the plaintiff's claim by three-fourths.

No other common law jurisdiction appears to have authority recognizing contributory fault as a defence in a conversion action generally. There are authorities recognizing the defence in actions for conversion of cheques.[5] However, there are *dicta* in English cases which run counter to the New Zealand authority[6] and in one Australian case the suggestion that contributory negligence could be relevant in a detinue action was repudiated.[7]

The position is complicated by the wording of section 4 of the Ontario *Negligence Act*,[8] which provides that:

> In any action for damages that is founded upon the fault of the defendant if fault or negligence is found on the part of the plaintiff that contributed to the damages, the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively.

There is a line of Ontario authority which says that the section is restricted to the tort of negligence.[9] However, there are authorities, including *dicta* in the Ontario Court of Appeal,[10] which would support a reading of section 4 as covering all liability in tort.[11]

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[4] *Helson* v. *McKenzies (Cuba St.) Ltd.*, [1950] N.Z.L.R. 878 (C.A.).

[5] These are referred to and discussed in J. Goldring, "The Negligence of the Plaintiff in Conversion" (1977-78) 11 M.U.L. Rev. 91, at 119-22.

[6] See the citations in *Day* v. *Bank of New South Wales* (1978), 19 A.L.R. 32 (S.A.S.C.), at 43-44, *per* Bray C.J. *Rest. 2d Torts* (1965), sec.481, read with secs. 217 and 222A, suggests that contributory negligence should be no defence to trespass or conversion actions in the United States.

[7] *Day* v. *Bank of New South Wales*, *supra*, note 6, at 44, *per* Bray C.J., and 53, *per* King J.

[8] R.S.O. 1980, c.315.

[9] See D. Cheifetz, *Apportionment of Fault in Tort* (1981), at 176, 31-32.

[10] See *Dominion Chain Co. Ltd.* v. *Eastern Construction Co. Ltd.* (1976), 12 O.R. (2d) 201, at 206 *per* Jessup J.A.; aff'd on other grounds *sub nom.*, *Giffles Assoc. Ltd.* v. *Eastern Construction Co. Ltd.*, [1978] 2 S.C.R. 1346 (on s.2 of the *Act*, below); and see also *Bell Canada* v. *Cope (Sarnia) Ltd.* (1980), 11 C.C.L.T. 170 (Ont. H.C.), aff'd (1981), 31 O.R. (2d) 571 (C.A.).

[11] There are also remoter indications, most notably *Regina* v. *Howson* (1966), 55 D.L.R. (2d) 582 (Ont. C.A.), at 593, *per* Laskin J.A. (appeal from conviction of theft of car; accused instructed by operator of parking lot on which car parked without permission to tow car away; Laskin considering *obiter* that operator should have restitutionary

(b) Contributory Fault as an Apportionment Principle

We consider that the court should have the power to apportion liability in cases of contributory fault or negligence.[12] The Law Reform Committee in its *Eighteenth Report* came to the opposite conclusion.[13] It had two concerns. One was practical, based on the complication contributory fault would add to title litigation. The Committee noted in particular that recognition of apportionment for contributory fault required a correlative recognition of a right of contribution between wrongful interferers. We agree, but do not see the objection as unduly troubling.

Complex title litigation is possible now, as was noted in the Ontario Law Reform Commission's *Report on Sale of Goods*.[14] There, in fact, the Commission proposed a *nemo dat* exception based on the true owner's lack of reasonable care in the entrustment of his goods to another.[15] At the time of the *Report on Sale of Goods* the Commission was equally divided on whether there should also be apportionment when the defendant relying on its proposed *nemo dat* exception was himself negligent.[16] As we note in chapter 11 above, the apportionment principle it commended was subsequently adopted in the *Uniform Sale of Goods Act* of the Uniform Law Conference of Canada.[17] But in the Commission's *Report on Amendment of the Law of Contract* it concluded that that objection, coupled with a concern about the inconsistency of the apportionment principle with the security in transactions principle that underlay many of the *nemo dat* exceptions, was determinative.[18]

As we concluded in our previous discussion of this history in the context of a lack of fault defence to liability for wrongful interference, it does not seem to us that the *Report on Amendment of the Law of Contract* is determinative on the point in issue. As with the previous context, we are

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claim for cost of removing car to accessible place of safekeeping). However, it seems hard to say, as *Salmond and Heuston on the Law of Tort*, 18th ed., by R. Heuston and R.S. Chambers (1981), at 101 does, that this shows Ontario recognizes contributory negligence as a defence to conversion.

[12] We discuss later the range of proceedings to which this should apply. We would note here that we envisage an application not only to the property torts but also proceedings where the tort is "waived". See ch. 18 of this Study Paper.

[13] Cmnd. 4774 (1971), para. 81. Its recommendation was embodied in the *Torts (Interference with Goods) Act 1977*, 1977, c.32, s.11(1) (for conversion or intentional trespass).

[14] *Report on Sale of Goods* (1979), Vol. II, at 314.

[15] *Ibid.*, at 310-11.

[16] See *ibid.*, at 311.

[17] The *Act* is set out in Institute of Law Research and Reform, *Report No. 38, The Uniform Sale of Goods Act* (1982). The relevant section is s. 6.4 (3).

[18] *Report on Amendment of the Law of Contract* (1987), at 269-70.

dealing with a situation where no *nemo dat* exception is operative. Where a *nemo dat* exception (present or proposed) is found to apply, it can be seen that in effect account has been taken of the equities arising out of the conduct of the true owner and of the equities arising out of the conduct of the defendant. As in the previous context, no such account has been taken.

We also considered the English Committee's other concern about a contributory fault defence, which appeared to be about a principle which would subject the custody of true owners to judicial review. The Committee in its *Eighteenth Report* felt that:

> much judicial time would be occupied, to little advantage, in considering what particular precautions are required from householders against burglars, or from an ordinary citizen against pickpockets, or from a store proprietor against shoplifters.[19]

We tend to share the sentiment of a commentator on this view, that it leads to "the strange result that a person is not bound to look after his own property as carefully as other people are expected to look after it for him".[20]

For our part, we do not think the same standard of conduct should be applied to each, and, if contributory fault were recognized as a defence, would expect the courts to apply a relatively low standard to true owners.[21] But we think that the true owner's conduct should be subject to review in more situations than just those where a *nemo dat* exception can be found.

We considered whether any defence of contributory fault should be restricted to cases where the true owner had entrusted the goods to another. This limitation is built into the *nemo dat* exception for the true owner's negligence put forward in the *Report on Sale of Goods*.[22] Further, it is clear that an affirmative act of entrustment is a serious step. The common law has given some recognition of this in allowing the possibility of a *nemo dat* exception, estoppel by negligence, which resembles that in the Commission's Report.[23]

But the dividing line between affirmative action and a failure to act may be hard to draw. Does a householder who leaves her house in the care of a new housekeeper, whose background has not been checked, in a neighbourhood where a fencing ring is known to be at work, "entrust" the contents of the house to the housekeeper? Or is this a case where there was

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[19] Cmnd. 4774 (1971), para. 81.

[20] *Salmond and Heuston on the Law of Tort*, 18th ed., *supra*, note 11, at 101.

[21] Cf. *Report on Sale of Goods*, *supra*, note 14, at 311.

[22] See Draft Sales Bill, s. 6.4, *Report on Sale of Goods*, *supra*, note 14, Vol. III, Appendix 1.

[23] See on the common law exception, Goldring, *supra*, note 5, at 106-16.

no entrustment at all, but simply a failure to check on the housekeeper before taking her on? Does the distinction this question requires make sense?

Entrustment is a factor in determining negligence; and the common law's traditional solicitude for the dispossessed owner, as we have said, seems likely to result in a relatively low standard of care in any event. Entrustment also has a clear causative significance: establishing causation in situations which are not clearly entrustment ones may be expected to be harder. But establishing causation absent clear entrustment will not be impossible, as the householder example was meant to show.

Further, recognition of the need to show causation means that a court need not conclude that, simply because the plaintiff made it possible for a thief to work, the plaintiff "caused or contributed to"[24] the chain of transactions leading to the defendant. Consider the householder who carelessly left his car keys in a place where his son, who has severely damaged the car on a number of previous occasions, can easily get at the keys. This time the son takes the car and resells it.[25] A court would be hard pressed to find causation in these circumstances.

(c) The Elaboration of an Apportionment Principle: Avoiding Unjust Enrichment

We note that at least one jurisdiction, Ireland, has included in its contributory fault legislation a provision making it relevant to a conversion case. The provision runs as follows:

> 34.—(1) Where, in any action brought by one person in respect of a wrong committed by any other person, it is proved that the damage suffered by the plaintiff was caused partly by the negligence or want of care of the plaintiff or of one for whose acts he is responsible (in this part called contributory negligence) and partly by the wrong of the defendant, the damages recoverable in respect of the said wrong shall be reduced by such amount as the court thinks just and equitable having regard to the degrees of fault of the plaintiff and defendant: provided that
>
> (2) For the purpose of subsection (1) of this section—...
>
> (d) the plaintiff's failure to exercise reasonable care in the protection of his own property shall, except to the extent that the defendant has been unjustly enriched, be deemed to be contributory negligence in an action for conversion of the property;[26]

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[24] See the quoted words from *Negligence Act*, *supra*, note 8, and Cheifetz, *supra*, note 9, at 13.

[25] Cf. Goldring, *supra*, note 5, at 114.

[26] *Civil Liability Act*, 1961, No. 4.

We think that the provision is insufficiently broad, not covering as it does actions for specific relief like detinue, or recaptions. We return to the matter of specific relief below. Here we would note that the failure to include it may be linked to the exception for unjust enrichment. The concern may be that a defendant should not be permitted to benefit by a money payment from his wrong. This concern was expressed by Professor Glanville Williams, whose work largely determined the content of the Irish Act.[27]

However, this concern does not entail exclusion of specific relief, it seems to us. Professor Williams gives the example of a person paying a fraudulent intermediary for the goods where the transaction was made possible by the plaintiff's carelessness. We do not think that the plaintiff's decision to recapt the goods or seek an order for their recovery should deny the defendant a claim which a conversion action would have allowed him.

It might be responded that this entails the odd result that a plaintiff may have to pay a wrongdoer to get his goods back. However, for the types of cases for which the principle we favour was designed, we do not find the result odd at all. And we would reiterate that the court may be expected to apply a relatively low standard of care to true owners compared with wrongdoing intermeddlers.

This discussion led us to a more detailed consideration of the unjust enrichment exception to the principle of the section of the Irish Act. It might be suggested that this exception cannot stand with the principle the section announces. Reconsider the example just discussed, on the basis that the defendant received the goods by way of gift. It might be said that, to the extent of the plaintiff's share of the responsibility for the gift, the enrichment would not be unjust.

However, we concluded that it would not be just to allow a defendant to have a claim in such a case. On the other hand, we think that the court has ample scope under the general "just and equitable" language in the Irish provision to deny such a claim. This is so even under comparative fault language like that in the present *Negligence Act*. However, it seems to us that the "just and equitable" language is rather clearer for the purpose.

This does not mean that every donee will be denied any recourse to the apportionment principle. Rather, the question remains whether, under the "just and equitable" rubric, the donee would thereby be unjustly enriched. Consider a case of a suit in conversion where the value of the goods has fallen since the date of conversion. Here we would envisage that, to the extent of the value decline, the application of the apportionment principle would not enrich the defendant donee. But if the true owner recapted the goods, the same donee should have no affirmative claim under this head. This is unless

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[27] See Glanville Williams, *Joint Torts and Contributory Negligence* (1951), at 10, from which the example in the following text is taken.

the donee had incurred expenses for which (although not having improved the goods) it would be just and equitable to compensate her. The exclusion of expenses resulting in improvements is because later in this chapter we recommend giving persons in the position of the donee an affirmative claim for them.

Also, this does not mean that purchasers for valuable consideration necessarily have the apportionment principle applied in full for their benefit. We considered the example of a defendant converter who purchased the goods at a significant undervalue. We further assumed that his bargain was not so good as to lead the court to deny him any claim at all (because he should have realized that the goods were being fenced). In this case the apportionment would only be to the extent of the consideration given by the defendant plus any expenses for which it would be just and equitable to compensate him.

An example might help to make all of this clearer. Consider a wrongful interference with a fur coat which was stolen from S and bought by M for $800. At the date of M's purchase the coat was soiled and in need of repair, but was worth $5,000. M had the coat cleaned and repaired for $500, and then stored it for a while for $200. The coat is now worth $4,800. Assume further that S is going to be found 20 % at fault.

If S sues M in respect of M's purchase, S's damages would be $5,000, subject to a reduction for her contributory fault of no more than $1,000. M would *not* be unjustly enriched, although $1,000 is more than her purchase price. This is because of the additional expenditures she made and the value decline of the goods. M may also have a claim for any part of her expenditures which could be considered improvements of the goods. However, M should not be able to recover for those expenditures to the extent that they have already been allowed for under the apportionment principle. On our example that would not be a problem.

(d) Apportionment Where the Defendant's Liability is Strict

Finally, we considered how apportionment might proceed where the defendant's fault was conversion, which on one view is a tort of strict liability. We do not see this to pose any special problems. We note that in the Ontario Law Reform Commission's 1988 *Report on Contribution Among Wrongdoers and Contributory Negligence* the application of the principle in other cases of strict liability was not seen to be unduly problematic.[28] Here, it seems to us that the court would consider the risks created by each party's

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[28] *Report on Contribution Among Wrongdoers and Contributory Negligence*, *supra*, note 3, at 234.

conduct and his knowledge or means of knowledge, as well as the degree of contribution of each to the wrongful interference.[29]

(e) Specific Relief and Recaption

All but one of the authorities that speak directly to the issue of the relevance of contributory fault in wrongful interference actions concern damages claims. The exception is one Australian authority,[30] on detinue, which is against any such defence in that situation. To the extent that the most recent Ontario cases are based, as they appear to be,[31] on the application of the *Negligence Act*, it might be suggested that they are necessarily limited to damages claims. This is because the relevant provisions of the *Act*—sections 2[32] and 4[33] as well as 8—appear to be restricted to such claims.

A further problem could be pointed to in this context. One species of detinue, *detinue sur bailment*, has a contractual character,[34] and traditionally contributory fault "in the sense that connotes apportionment, had no place in contractual relations".[35] However, we note that recent case-law suggests that in situations where a contract gives rise to a duty of care whose breach is in issue (as in bailment, where the bailee who has lost the goods has a defence of showing reasonable care was taken) apportionment will be

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[29] Cf. T. Kutner, "Contribution among Tortfeasors: Liability Issues in Contribution Laws" (1985) 63 Can. Bar Rev. 1, at 40-42.

[30] *Day* v. *Bank of New South Wales*, *supra*, note 6, at 44, *per* Bray C.J., and 53, *per* King J.

[31] See authorities in note 7, *supra*.

[32] *Negligence Act*, *supra*, note 8, s.2:

> Where damages have been caused or contributed to by the fault or neglect of two or more persons, the court shall determine the degree in which each of such persons is at fault or negligent, and, where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each is liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent.

[33] *Negligence Act*, *supra*, note 8, s.4:

> In any action for damages that is founded upon the fault or negligence of the defendant if fault or negligence is found on the part of the plaintiff that contributed to the damages, the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively.

[34] See *Clerk & Lindsell on Torts*, 14th ed., A.L. Armitage & R.W.M. Dias eds. (1975), para. 1177; but see N.E. Palmer, *Bailment* (1979), at 55-57 (emphasizing availability of *sui generis* bailment claim here).

[35] M. Bridge, "Defective Products, Contributory Negligence, Apportionment of Loss and the Distribution Chain" (1981-82) 6 C.B.L.J. 184, at 196.

applied.[36] There is even authority, which is "tenuous",[37] suggesting that there will be apportionment in cases of strict contractual liability, at least where that liability is in essence a hybrid (historically) of contract and tort. One such hybrid would be the implied quality terms in sale of goods contracts. Bailment liability has a somewhat similar mixed pedigree, although it partakes as well of property law.[38]

It seems to us to follow from what we said earlier in this chapter that there should be the possibility of apportionment for contributory fault in all wrongful interference actions, whether for damages or for specific relief. The true owner should not simply by his choice of remedy in this respect be able to oust the possibility of the defence. The form of order to which the apportionment, if appropriate, would give rise in a successful action for recovery *in specie* would be one for a compensating allowance by the plaintiff to the defendant.

It would also seem to us that if the true owner recovered his goods through self-help, there should be the possibility of an action against him for the amount for which he would have been liable in a specific relief action he might otherwise have brought.[39]

We would repeat here that we do not expect all of this would be unduly burdensome. The defendant would carry the burden throughout of showing the plaintiff's contributory fault[40] and the burden as we indicated should be a heavy one.

(f) The Commission's Project on Contribution Among Wrongdoers and Contributory Negligence

We note that the *Negligence Act* is the subject of a report of the Ontario Law Reform Commission.[41] We considered it desirable that the reforms we have proposed here should, to the extent we considered it possible, harmonize with those of the Commission in that Report. Further than that, we

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[36] See e.g. *Ribic* v. *Weinstein* (1982), 140 D.L.R. (3d) 258 (Ont.H.C.). The form of apportionment here is not that under the *Negligence Act*, it seems, but rather comparative causation.

[37] Bridge, *supra*, note 35, at 202, referring to, *inter alia*, *Carmichael* v. *Mayo Lumber Co. Ltd.* (1978), 85 D.L.R. (3d) 538 (B.C.S.C.).

[38] See Palmer, *supra*, note 34, at 1-2, 55-57.

[39] See our discussion of the related issue in relation to the lack of fault defence we propose in ch. 11 above.

[40] This would include showing the causative significance of any carelessness of the plaintiff.

[41] *Report on Contribution Among Wrongdoers and Contributory Negligence*, *supra*, note 8.

would recommend that our proposals should be implemented only as part of that more comprehensive reform.

However, so that our recommendations might be better understood, we have included provisions in our draft *Act* in Appendix I to this Study Paper[42] to give effect to those recommendations. We have examined the draft *Act to Revise the Law Respecting Comparative Fault and Contribution Among Wrongdoers* included with the *Report on Contribution Among Wrongdoers and Contributory Negligence*,[43] and we consider that our recommendations here are within the effect of the relevant provisions of that *Act*.

We should note here that in the course of elaborating these recommendations we considered whether their application might not raise difficult questions in one common situation. That situation concerns a defendant who loses goods or pays their value in a wrongful interference action who then proceeds against his vendor on the implied warranty of title in his sale contract. Should the vendor be able to plead that the purchaser-defendant should have taken the contributory fault point in the original proceedings? This sort of point gave the English Committee concern in its *Twelfth Report (Transfer of Title to Chattels)*.[44]

It seems to us that, if the vendor should have that facility, the damages for breach of contract should not be reduced simply because the purchaser had an arguable contributory fault claim. That is, we would seek to meet the Committee's point, at least in part, by distinguishing between merely arguable and clearly maintainable contributory fault claims.

There is a rather more serious question, however. This is whether the vendor should be able to bring a contribution claim against the true owner who recovered the goods or their value.[45] On this question—which illustrates the degree of interconnection between contributory fault and contribution questions we referred to earlier—we are inclined to the view that no right to contribution should arise. After all, the true owner is not a wrongdoer, and has a superior title to the vendor-claimant.

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[42] Ss. 4 and 5.

[43] *Supra*, note 8, appendix 24. We note the exclusion of some wrongful interference torts in s.2(2)(a): as the footnote to that paragraph indicates, the matter of appropriate policy was simply being left open. We also note that the apportionment principle in s.2(1) is based on a determination of comparative "degrees of fault". We would prefer the "just and equitable" locution, contained in s. 9(1) of the *Act* (contribution among wrongdoers).

[44] Cmnd. 2958 (1967), para. 12 (on contribution).

[45] While such a claim would not seem possible under the *Negligence Act*'s contribution principle in section 2 (the plaintiff is not a tortfeasor), it might be possible at common law: cf. E. Weinrib, "Contribution in a Contractual Setting" (1976) 54 Can. Bar Rev. 338; and the emerging tort of negligently caused economic loss, on which see M.G. Bridge & F.H. Buckley, *Sales and Sales Financing in Canada: Cases and Materials* (1981), at 400.

In any event, we believe such matters as these two should be left to the general law on the effects of contributory fault. Neither of them seems to us to have a particular wrongful interference dimension requiring further analysis here.[46]

3. THE POSSIBILITY OF CONTRIBUTION CLAIMS IN WRONGFUL INTERFERENCE ACTIONS

(a) INTRODUCTION

It is unclear whether under present law contribution is of very much relevance in wrongful interference actions, although in our view it should be seen to have considerable relevance, and the law should be reformed to affirm this.

The major contribution principle is expressed in section 2 of the *Negligence Act*.[47] This provision says that where damages have been caused or contributed to by the fault or neglect of two or more persons,

> ...and where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each is liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent.

At least one recent *dictum* states that "fault" is not limited to the tort of negligence.[48] Thus, one could readily suggest that contribution under the *Act* is possible at least in damages claims involving direct dealing situations, such as a sale by the contributor to defendant-contribution-claimant, where the sale is a wrongful interference.[49]

It is rather less clear to us whether contribution under the *Act* is possible where the contributor and the defendant are parties to different interferences. The obvious example would be successive conversions—as by sales—in a chain of transactions away from the theft of the plaintiff's goods. It

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[46] See *Report on Contribution Among Wrongdoers and Contributory Negligence*, *supra*, note 8, ch. 10.

[47] The complete text of s. 2 is in note 32, *supra*.

[48] *Dominion Chain Co. Ltd.* v. *Eastern Construction Co. Ltd.* (1976), 12 O.R. (2d) 201 (C.A.), at 206, *per* Jessup J.A.; aff'd on other grounds *sub nom.*, *Giffles Assoc. Ltd.* v. *Eastern Construction Co. Ltd.*, [1978] 2 S.C.R. 1346.

[49] Thus, we note that the contribution principle in *Rest.2d Torts* (1965), sec. 886A apparently does not apply to trespass or conversion claims; however, in practice this has been modified: see sec. 886A, comment j. We would further note, however, that in our sale example the implied obligation as to title would override the contribution scheme. Cf. Bridge, *supra*, note 35, at 196.

might be argued that the "damages" are sufficiently different in the case of each interference so that, in the terms of section 2, it cannot be said they have been "caused or contributed to by the fault or neglect of [the parties in question]".

However, it seems to us that if section 2 is recognized as having a restitutionary basis, then it should be seen to extend to successive wrongful interferences. In the Ontario Law Reform Commission's *Report on Contribution Among Wrongdoers and Contributory Negligence* it indicated that such a basis should be so recognized.[50]

Furthermore, although direct authority is lacking, it seems to us that a plaintiff who has recovered the goods or their value cannot recover from another converter without giving credit for the value he received against the value he now claims. This principle is needed to prevent double recovery.[51]

Thus, we agree with the slender authority which has discussed the point and supports the application of a statutory contribution scheme like Ontario's to successive conversions.[52]

(b) Providing for Contribution Claims

We have already commended apportionment for contributory fault. It seems to us that if the right of the defendant to have his damages liability reduced or eliminated for contributory fault is recognized, it does not make sense to ignore the fault of others in the chain of transactions before the defendant's which caused or contributed to the defendant's loss.[53] However, it seems to us that this point makes most sense where the result of a judgment against the defendant-contribution-claimant is *pro tanto* to prevent the plaintiff recovering against another wrongdoer in the chain. As we have indicated, this places the right to contribution on a restitutionary basis.

In the Ontario Law Reform Commission's *Report on Contribution Among Wrongdoers and Contributory Negligence* it recommended redrawn

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[50] *Supra*, note 8, at 49ff.

[51] Cf. *Solloway* v. *McLaughlin*, [1938] A.C. 247, at 257-58 (P.C. Ont.); and *Aitken Agencies* v. *Richardson*, [1967] N.Z.L.R. 65, at 67.

[52] See Glanville Williams, *supra*, note 27, at 19, citing *United Australia, Ltd.* v. *Barclays Bank*, [1941] A.C. 1 (H.L.), at 19, *per* Viscount Simon. It is possible that contribution at common law might be extended to cover this case: cf. Weinrib, *supra*, note 45, *passim*. But we note also that the leading authority denying a general contribution principle at common law arose out of a conversion: see *Merryweather* v. *Nixon* (1799), 8 T.R. 186, 101 E.R. 1337. It is also possible that the emerging tort of negligently caused economic loss would be of assistance—but in our earlier example only for a later converter seeking contribution from an earlier one. Cf. Bridge & Buckley, *supra*, note 45, at 400.

[53] Here we agree with the views of the Law Reform Committee in its *Eighteenth Report*, as noted earlier.

contribution legislation which, more clearly than the present statute, rests on a restitutionary foundation.[54] This legislation would then more clearly authorize contribution claims in wrongful interference settings.[55]

However, the English Law Reform Committee in its *Twelfth Report (Transfer of Title to Chattels)* rejected any such principle on the basis of the undue complication it would add to title litigation.[56] In the present setting, of course, the burden does not fall as much on true owner plaintiffs as it does in the case of the contributory fault principle we would recognize. Nor should it be forgotten that contractual indemnity claims, based on obligations as to title, are possible now. Overall, we do not think that the practical concerns are sufficiently weighty to be determinative.

(c) Contribution Where Neither Contributor Nor Contributee was Careless

We considered how our proposal would work in cases where neither contributor nor contributee was in any way careless. In such a case it seems to us that the court should be able to consider the respective proximities of the parties to the true owner.[57] The closer to the true owner the greater should be the share of liability, other things being equal.

It seems to us that the current comparative fault language in the *Negligence Act* would allow the court to so proceed, although the matter is not very clear. We considered whether it was worth spelling out, for the benefit of the court, relevant factors like that of proximity.

However, we note that model Canadian uniform contribution legislation, which allows for contribution claims in cases of conversion, uses "just and equitable" language similar to that in the Irish contributory negligence section that we earlier discussed.[58] This language is rather clearer in the respect that concerns us than the language of the *Negligence Act*, and we note that the "just and equitable" locution is used in the draft Act accompanying the Commission's *Report on Contribution Among Wrongdoers and Contributory Negligence*.[59] If that language were used, we thought the factors of proximity which we have just discussed not worth separate specification in any reforming legislation.

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[54] See the draft statute referred to *supra*, text at note 43.

[55] We note that the Report leaves open the application of its contribution scheme in our setting: *supra*, note 8, at 239.

[56] Cmnd. 2958 (1967), paras. 8-12.

[57] See the approach to a related contribution problem commended in Kutner, *supra*, note 29, at 40-42.

[58] See the references in *ibid.*, 39 n.167.

[59] *Supra*, note 43, s.9(1).

We note that a number of proposals have been made to permit contribution in cases of torts like conversion, and Irish contribution legislation so provides.[60] However, all of these proposals seem to assume that the contributor would be liable to the plaintiff for the same loss (wrongful interference) as the contributee. We think that unduly limiting, as we have indicated. A wrongful interferer's contribution to a chain of transactions leading to the defendant's should be sufficient to make him liable to make contribution.

(d) Specific Relief and Recaption

As in the contributory negligence area, there appears to be little or no authority, except the Australian case on detinue already referred to, which would tend to discountenance contribution here.[61] The language of the *Negligence Act* provision (section 2) would similarly tend against the application of the statutory scheme.[62]

We have already indicated that the recognition of a contributory fault defence and the element of unjust enrichment for us argue in favour of contribution rights in this area. We have also seen that recovery of goods from the contribution claimant is to be treated in the same way as a damages award against him.

We would simply affirm here, as we have suggested in other contexts in this Study Paper, that it should not matter how recovery was obtained, whether by court order or by recaption.

We would thus recommend that the right to contribution should not be affected by the fact that the contribution claimant suffered the loss of the goods rather than a judgment for damages or an order for specific recovery.

(e) The Ontario Law Reform Commission's Project on Contribution Among Wrongdoers and Contributory Negligence

The matter of contribution was dealt with in the Commission's *Report on Contribution Among Wrongdoers and Contributory Negligence*. As with our contributory fault recommendations, we consider that the present recommendations should as far as possible be harmonized with, and thus given effect to under, the more comprehensive reform with which that Report is concerned.

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[60] See the references in Kutner, *supra*, note 29, at 39 n.167.

[61] See *Day* v. *Bank of New South Wales*, *supra*, note 6, at 44, *per* Bray C.J., and 53, *per* King J.

[62] Again, common law contribution and the tort of negligently caused economic loss might now point the other way: see references in note 51, *supra*.

We should note that we considered one specific matter which was raised in connection with our proposals for the wrongful interference area. This matter was the ability of a defendant to make a contribution claim outside the original proceedings against him. The *Negligence Act* now precludes this, except after a settlement.[63] We do not consider that any such preclusion in this context makes sense. However, this problem seems to us to have no special wrongful interference dimension and has been left to the Commission's Report.[64]

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[63] Cheifetz, *supra*, note 9, at 79 ff.

[64] See *supra*, note 3, at 209-17.

CHAPTER 14

LIMITATION PERIODS IN WRONGFUL INTERFERENCE CASES

1. INTRODUCTION

The limitation period for the property torts is six years "after the cause of action arose".[1] Time begins to run, in the case of trepass to goods from the time of the direct interference.[2] In the case of conversion and detinue it runs from when the relevant interference occurs.[3] And in the case of injury to a reversionary interest, time runs from when the injury is sustained.[4] We considered two major issues in respect of this law. One concerned the position of good faith purchasers for value. The other concerned the time from which the relevant period should run.

2. A TWO YEAR LIMITATION PERIOD FOR GOOD FAITH PURCHASERS

Under present Ontario law, people who acquire goods for value without being aware of a problem with title, or without being wilfully blind to one, are now treated for limitation purposes in precisely the same way as purchasers in bad faith or donees. However, under the law of Quebec, there is a special limitation period for actions in revendication. It is three years after loss of the goods for the benefit of someone who acquired them in good faith and for value.[5] This compares with thirty years in other cases.[6]

We considered the question whether a special period like the Quebec one was an appropriate reform. Under our earlier proposal for a defence of lack of fault, some but not all of the group at whom the reform under discussion here would be addressed, good faith purchasers for value, would

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[1] *Limitations Act*, R.S.O. 1980, c. 240, s. 45(1)(g).

[2] See J. Williams, *Limitation of Actions in Canada*, 2nd ed. (1980), at 63.

[3] *Ibid.*, at 64.

[4] *Ibid.*, at 62.

[5] See *Civil Code*, art. 2268(2).

[6] See *Civil Code*, art. 2242.

be protected in that way. Thus, intermediate merchant handlers, or intermediate consumer handlers who could not show they acted with due care, would not be protected under our earlier proposal.

We agree with the thrust of the special limitation period for good faith purchasers for value. It seems to us appropriate to protect innocent participants in exchange transactions in this fashion, even ones not able to make out our lack of fault defence, either because they could not show due care, or because they were merchants. We would thus propose the modification of the law on limitation of actions to provide for a special limitation period for good faith purchasers for value. The question of the effect of the expiry of this special period on title is returned to below.

Our consideration led us to favour one modification of the Quebec postion. We would reduce the three year period to two. This is in line with the simplified limitation period structure in the former draft limitation legislation for Ontario that we have examined, which generally speaking had two and six year periods.[7] We note that that draft legislation in fact had a six year limitation period for all of the property torts, except trespass, where the period was two years.[8] We would not suggest further modifying this structure. It follows that our proposal is only of importance for causes of action other than trespass, which is the tort covering the least serious forms of interference in any event.

3. THE RUNNING OF THE LIMITATION PERIODS

It has been recognized for some time that having time run, in the case of conversion and detinue, from when the relevant transaction constituting the tort occurred produces a set of anomalies.[9] In a chain of transactions, the person further from the start of the chain will be easier to sue than the presumptively less innocent parties through whose hands the goods passed earlier. Furthermore, the person in possession will never have a limitation defence, even if he has held for more than six years. This is because the true owner can always make a demand for the goods and erect a conversion or detinue claim on the refusal to give them up.

In the Ontario Law Reform Commission's 1969 *Report on Limitation of Actions* the Commission recognized this set of anomalies and commended the solution in the English limitation legislation of the time.[10] This

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[7] See Ontario, Ministry of the Attorney General, *Discussion Paper on Proposed Limitations Act* (1977). We note that the proposed *Limitations Act* there was translated into Bill 160, *An Act to Revise the Limitations Act*, 3d Sess., 32d Leg. Ont., 1983.

[8] Bill 160, *ibid*., ss. 3(2), 4, 5 (conversion and detinue). and 3(1) 2 (trespass).

[9] See J. Falconbridge, "The Disorder of the Statutes of Limitation" (1943) 21 Can. Bar Rev. 669, at 679-80.

[10] Ontario Law Reform Commission, *Report on Limitation of Actions* (1969), at 130. See

solution was to have time start to run for all defendants from the first conversion in the chain. The solution is contained in the draft limitation legislation for Ontario which was first put forward in 1977.[11]

We noted that there are a number of problems with this solution. One is that the rule is more favourable to a purchaser of stolen than of lost goods. This is because the first conversion in the case of stolen goods will be the theft, while the first conversion of goods which are lost will typically be when the finder resells them. A second is that the new rule means a plaintiff could lose his right to sue before becoming aware of the first conversion.

Both this unevenness of treatment and the tracing problems were considered in the English Law Reform Committee's *Eighteenth Report (Conversion and Detinue)*[12] and in its 1977 *Twenty-First Report (Final Report on Limitation of Actions)*.[13] The solution proposed in the latter commends itself to us. This has time start to run in the case of stolen goods from the first disposition to a *bona fide* purchaser of the stolen goods. Time would never run as against the thief or any receiver. The current English limitations legislation embodies this solution, except that it refers only to thieves, not receivers.[14]

We believe that the *Twenty-First Report's* inclusion of receivers was right. The only difficulty we have with the Report's solution is the possibility that a thief or receiver who re-acquired the goods after a good faith purchaser might have a limitation defence in respect of the *later* interference with the goods. Although the practical importance of this is slight, we consider any reform should make it clear that the thief or receiver can never benefit from these rules.[15]

Finally, notwithstanding our proposal here, we would further propose that the special limitation period for good faith purchasers for value which we have put forward always run from the first conversion, whether by theft or otherwise. We consider that the desirability of this protection for innocent participants in exchange transactions outweighs the anomalies we have described.

Limitation Act 1939, 2 & 3 Geo. 6, c.21, (U.K.), s.3 (2). One Canadian province followed the English: see *Limitation of Actions Act*, R.S.M. 1987, c. L150, s.55 (1).

[11] Bill 160, *supra*, note 7, s.7.

[12] Cmnd. 4774 (1971), paras. 83-87.

[13] Law Reform Committee, *Twenty-First Report (Final Report on Limitation of Actions)* Cmnd. 6923 (1977), paras. 3.1 to 3.18.

[14] *Limitation Act 1980*, c.58 (U.K.), ss.3 and 4.

[15] A thief or receiver preceding the first disposition to a good faith purchaser for value is meant here: see *Limitation Act 1980*, *ibid.*, s.3.

4. THE EXPIRY OF THE LIMITATION PERIOD, TITLE AND RECAPTION

The proposals we have just discussed, the special limitation period for good faith purchasers, and the points from which time should run, can be significantly undercut by the self-help remedies. If the true owner recovered possession in this way, the limitation periods we have discussed would, as they stand, be irrelevant to him. This is also a feature of the present law in Ontario.

Accordingly, we propose that, as English law has provided since 1939,[16] the expiry of the limitation period should operate on the true owner's title. However, unlike the English, we would have the extinction operate only as against the person entitled to the benefit of the relevant period. This would be of significance only in respect of our special limitation period. The concern we felt about the special period in Quebec law, if that period (as we have modified it) were subsumed under a scheme like the English one, was that it would operate to permit too ready a "laundering" of title. Our proposal for relative title extinction responds to that concern. In effect, this appears to be the Quebec position also.[17] That is, the good faith purchaser rule confers an immunity that cannot be transferred with the goods: any subsequent purchaser must show his own good faith.

5. CONTRIBUTION CLAIMS

We considered the matter of whether the right of action for contribution should depend on whether the limitation period for action by the true owner against the contributor had expired. At present the authorities under the *Negligence Act* tend to say that that right does so depend.[18] We incline to the view that the right of contribution should not so depend, and we note that that is the view expressed in the Ontario Law Reform Commission's *Report on Contribution Among Wrongdoers and Contributory Negligence*.[19] As with a number of other problems in the contribution and contributory fault area, we concluded that further analysis in this Study Paper was inappropriate, as the matter had no distinctive wrongful interference dimension.

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[16] See *Limitation Act 1939*, *supra*, note 10, s. 3 (2); see also Manitoba *Limitation of Actions Act*, *supra*, note 10, s.55(2); *Limitations Act*, R.S.B.C. 1979, c.236, s. 9 (2).

[17] See Y. Caron, "La vente et le nantissement de la chose mobilière d'autrui: deuxième partie" (1977) 23 McGill L.J. 380, at 387-88, although the point is not altogether clear from this source.

[18] See D. Cheifetz, *Apportionment of Fault* (1981), at 41-55 who contrasts the position at common law between joint debtors. See also Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (1988), ch. 7, sec. 2.

[19] *Supra*, note 18, ch.7, s.2(c).

A related matter was whether a bad faith buyer from a good faith one could proceed against his seller on the warranty as to title where only the former had a limitation defence. On the one hand it could be said that to allow such a claim would make a good faith seller the guarantor of the good faith of his buyer. On the other hand, it could be said, at least in cases of wilful blindness, that such might be justified where the seller was warranting title. In any event, and more generally, a buyer should not have to rely on limitation arguments (such as proving his good faith or that of a predecessor) to make out title. In all the circumstances, we consider that the matter is best left to the law of warranties as to title, which would suggest liability in this case.[20]

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[20] See Ontario Law Reform Commission, *Report on Sale of Goods* (1979), Vol. I, at 196 (on whether a buyer qualifying under a *nemo dat* exception should be able to sue his seller for breach of the warranty as to title); and cf. M.G. Bridge, *Sale of Goods* (1988), at 550.

CHAPTER 15

IMPROVEMENTS TO GOODS WRONGFULLY INTERFERED WITH

1. INTRODUCTION

The law as to improvements made to goods when or after they have been wrongfully interfered with seems reasonably well established in cases where the defendant was the improver. The authorities on improvements generally concern such cases. The plaintiff who recovers damages based on conversion (as by purchase by the improver) before the improvement was made will do so based on the value of the goods as at that earlier date, and to that extent the defendant will receive the benefit of the improvement.[1] The position may be otherwise where the plaintiff can base his claim on a conversion after the improvement,[2] or is proceeding in detinue, although there is recent English Court of Appeal authority favouring an allowance in both cases.[3]

There is some authority for the view that if the improver is the *plaintiff* (as where the true owner has repossessed the goods) he may be able to claim an allowance.[4] However, the law is generally assumed to be against such a claim.[5] And there is a contrary Ontario Court of Appeal authority which is strong support for that assumption.[6] However, in that case the claimant

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[1] J.G. Fleming, *The Law of Torts*, 7th ed. (1987), at 64.

[2] But see *Highland Leasing* v. *Paul Field*, [1986] C.L.Y. 3224, discussed and criticized in *Clerk & Lindsell on Torts*, 15th ed., Fifth Cumulative Supplement, R.W.M. Dias ed. (1987), para. 21-91.

[3] See Fleming, *supra*, note 1, at 64; and *Greenwood* v. *Bennett*, [1973] Q.B. 195 (C.A.), which is discussed in P. Matthews, "Freedom, Unrequested Improvements and Lord Denning" [1981] Camb. L.J. 340. The position in conversion in *Rest. 2d Torts* (1965), sec. 927 (see comment f), is otherwise; but there is no right to an allowance on replevin, except when the defendant retains possession by putting up a bond: *ibid.*

[4] See *Mayne* v. *Kidd*, [1951] 2 D.L.R. 652 (Sask. C.A.).

[5] See D. Gordon, "Anomalies in the Law of Conversion" (1955) 71 L.Q. Rev. 346 and A. Weir, "Doing Good by Mistake–Restitution and Remedies" (1973) 31 Camb. L.J. 23. This is also the position in the United States: see *Rest. Restitution* (1937), sec.42, and G. Palmer, *The Law of Restitution* (1978), Vol. II, sec.10.9(f).

[6] *Ings* v. *Industrial Acceptance Corp. Ltd. et al.*, [1962] O.R. 454, discussed in G. Klippert, *Unjust Enrichment* (1983), at 77-79.

failed for another reason, namely, that he did not act with "ordinary care and caution" in purchasing the automobile he improved, since he did not search for liens or mortgages registered against the vehicle.[7]

The authorities are unclear where improvements made by *third parties* from whom the defendant derived his interest are concerned. There is early Canadian authority supporting the view that a good faith purchaser from a good faith—but not from a bad faith—improver can claim an allowance.[8] And a relatively recent English authority holds that in interpleader proceedings to which the true owner and the improver were parties an order for specific restitution to the true owner could be made only on terms that the *bona fide* improver be compensated.[9]

2. REFORM OF THE LAW

The English Law Reform Committee in its *Eighteenth Report*, writing before the recent authority just referred to, was troubled by the dearth of English case law.[10] They saw no reason to distinguish the situation where the improvements were made by a third party from that where the defendant was the improver. They therefore recommended that any increase in value that was the result of activities of third parties should be treated in the same way as increases resulting from actions of the defendant.[11] The *Torts (Interference with Goods) Act 1977* generally so provides as part of a provision giving improvers with an honest but mistaken belief as to title, and "good-faith" purchasers from improvers, a right to an allowance for such value increases.[12]

We agree with the general principle the *Act* expresses. The rationale for these rules seems to us to be that the true owner should not make a profit out of the tort at the expense of an innocent defendant. We recognize that the true owner in these cases will not have asked for the improvement.[13] But it seems to us that this should not be a barrier to relief, at least where relief would not impose a harsh burden on the true owner, a point we return to

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[7] *Ings* v. *Industrial Acceptance Corp. Ltd.*, *supra*, note 6, at 461 (source of quotation).

[8] See *Greer* v. *Faulkner* (1909), 40 S.C.R. 399. The position in the *Rest. 2d Torts* (1965), sec. 927 (see comment f), is similar.

[9] *Greenwood* v. *Bennett*, *supra*, note 3.

[10] English Law Reform Committee, *Eighteenth Report (Conversion and Detinue)*, Cmnd. 4774 (1971), para. 89.

[11] *Ibid.*

[12] *Ibid.*, 6.

[13] See Klippert, *supra*, note 6, at 78-79; and Matthews, *supra*, note 3, *passim*.

later.[14] However, we also have a number of concerns about the way the *Act* deals with the principle, which we now discuss.[15]

(a) Allowance at Court's Discretion to Reasonable Claimants

We consider that a general problem with the English section is that it is insufficiently open-textured for the variety of cases with which it should deal. At the same time it should offer the court guidance which it does not do now. This is particularly desirable in light of the thinness of the case law in this area.

We favour a rule which would give the court authority, but not an obligation, in a wrongful interference action to make an allowance for improvements made to the goods wrongfully interfered with, for the benefit of persons who acted reasonably as improvers or purchasers of improved goods. We prefer reasonableness to a mistaken but honest belief as to title or good faith as in the English provision. One example we considered with which we felt the English *Act* would not deal satisfactorily was that of a person who, left with the plaintiff's car, and after reasonable but unsuccessful attempts to get him to reclaim it, repairs and resells it.[16] For the assistance of the court a non-exhaustive list of factors bearing on reasonableness should be spelt out, to include honest belief as to title, reason to know of another's interest, attempts to contact such person, and the necessity for the expenditures in question.

It will be noted that our recommendation would permit an allowance to a defendant in a wrongful interference action, whether the defendant was an improver or a purchaser of improved goods. Although it is not altogether clear, it seems to be the case that a good faith purchaser from a bad faith improver could claim an allowance.[17] This seems to us to be preferable to the common law position, when reference is made to what we have identified as the guiding principle of the reform commended here, namely, that the true owner should not profit from the tort at the expense of an innocent defendant.

However, the position just described would create a problem where a purchaser unable to make out the claim sues his seller on a warranty of title,

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[14] We share the views in R. Goff and G. Jones, *Law of Restitution*, 3d ed. (1986), at 144-149, in this respect.

[15] We found very helpful the discussion in V. Sacks, "Torts (Interference with Goods) Act 1977" (1978) 41 Mod. L. Rev. 713, at 713-17.

[16] See *Munro* v. *Willmott*, [1949] 2 K.B. 295, discussed by Sacks, *supra*, note 15, at 714. And see now *Highland Leasing* v. *Paul Field*, [1986] C.L.Y. 3224 (so holding on *Act*, s. 6 (1)).

[17] See Matthews, *supra*, note 3.

where the seller would have had a claim.[18] This takes us to a further feature of the English provision.

We note that the English section also provides that, in an action by a purchaser for recovery of the purchase price on a failure of consideration, the allowance shall "where appropriate" be made in favour of the seller. One principle here seems to be that of preventing the purchaser being "paid" twice for the improvement. Thus, if the improver and not the purchaser is sued for wrongful interference the allowance would not be "appropriate". But a further principle involved here would seem to allow the seller to argue in limitation of his liability that he should not be liable to the purchaser for more than he would be liable to the true owner. Thus, we would endorse this extension of the basic recommendation.

It will not be in every case where a person acted reasonably that he should get an allowance. To repeat, the court should have a discretion here. One situation where no order might be made would be where the claimant has a contract under which the other party is liable for the expenditure in question.[19] One example given to us was of a claimant garage which did work for another converter. But not every such situation should involve denial of an otherwise meritorious claim. Consider a purchaser of goods who subsequently improves them. He may well have a claim against his seller for the cost of the improvements as damages for breach of the obligation to give quiet possession.[20] Yet it is not clear to us that the purchaser should be denied an allowance under our proposal here.

We considered whether an allowance to an otherwise meritorious claimant should always be made where the other person, but for the wrongful interference, would have made the improvements himself.[21] While we have concluded that this factor should influence the court to make an allowance, it does not seem to us that such an allowance should be mandatory in such a case. Situations where the improvements were only to have been made on a do-it-yourself basis, or where the interference can be said to have deprived the true owner of a chance to reconsider, come to mind.

One concern that did arise was for the true owner for whom making an allowance would be a harsh burden. The example was given of unique goods recovered by a person without free funds to pay for the improvement.[22] One response, discussed below, would be to provide for an allowance, payment of

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[18] Cf. *Rest. 2d Torts* (1965), sec.927, comment g.

[19] See Goff and Jones, *supra*, note 14, at 147; and J. Dawson, "The Self-Serving Intermeddler" (1973-74) 87 Harv. L. Rev. 1409, at 1444-50.

[20] See *Mason* v. *Birmingham*, [1949] 2 K.B. 545.

[21] See Goff & Jones, *supra*, note 14, at 144; and Weir, *supra*, note 5, at 27; but compare American law, in Wade, "Restitution for Benefits Conferred without Request" (1965-66) 19 Vand. L. Rev. 1183, at 1202.

[22] Goff & Jones, *supra*, note 14, at 147 n.62.

which is deferred. For reasons given below we reject this solution. Rather we favour including as a factor for the court to weigh the reasonableness of requiring a person who is seeking to recover the goods to pay for improvements where this would require sale of the goods.[23]

Finally, we address in the next section one other matter which the court could take account of in deciding whether to exercise its discretion. This is whether the improvements have any value at all to the person asked to make the allowance.

(b) The Allowance Principle

A problem with the English section is that it is capable of being too generous to claimants, where the value of the goods increases by more than the cost of the improvements. The example was given of a painting on which $500 is spent cleaning it, with the result that what was worth $100 is shown to be worth $1,000.[24] We agree that the allowance principle should be expressed as the lesser of cost or value.[25] However, we consider that this would not necessarily be fair in cases where the claimant is entirely free of consciousness of wrongdoing.[26]

We would therefore recommend that the court make allowances at the lower of cost or value, except when the court, in the light of the claimant's ignorance of his wrong and all the other circumstances, considers this would be unfair to the claimant. Furthermore, it also seems to us that where practicable the court should always be able to order physical separation of any improvement. The model that appeals to us here is in the *Personal Property Security Act, 1989*.[27]

We considered the case of an "improvement" which improved the commercial value of the goods, but which was of no value at all to the person asked to make an allowance for it on a recovery *in specie*. An example was the customizing of a car to a design to which the plaintiff objected. This seems to us to be a factor which the court should take account of in deciding whether to make an allowance at all in these cases. The court should have the power to deny an allowance in what we would envisage to be such exceptional cases. After all, the maker of the allowance will usually have difficulty showing that commercially valuable improvements have no value to him, either now or when (if) he were to resell the goods.

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[23] See also *ibid*.

[24] See Sacks, *supra*, note 15, at 715.

[25] Which would appear to be the common law position: see Goff & Jones, *supra*, note 14, at 26-27; and see also Sacks, *supra*, note 15, at 715-16.

[26] See D. Oesterle, "Deficiencies of the Restitutionary Right to Trace Misappropriated Property in Equity and in U.C.C. [sec.] 9-306" (1983) 68 Cornell L. Rev. 172, at 200-02.

[27] S.O. 1989, c. 16, s. 37 (4)(5) (power of secured party to sever accession from whole)

We further considered whether the court should have the power to make an allowance not only in the form of a lump sum or a physical separation order but also in instalments. This led us to consider whether the court should have power to provide for a deferred claim, which would be paid when the other party disposed of the goods.[28] Neither form of order is part of present law. While we were initially attracted to these possibilities, especially in the case of impecunious true owners, we concluded that our recommendation should not allow for them. We were concerned most about their practicability, and with our basic principle, that the holder of the relevant property interest should not profit from the tort. Situations come to mind involving difficulties in enforcing instalment orders, and the status of deferred claims when a true owner who had recovered the goods gave them away to a donee who resold them.

(c) Allowance in Case of Self-Help

We note that the English provision in the *Torts (Interference with Goods) Act 1977* is limited to proceedings for wrongful interference against the person who claims the allowance. It does not give an affirmative claim for an improvement against someone who recovers the goods without the aid of judicial process. We do not think this is consistent with the basic principle on which the provision and our recommendation rest. We are not taken by the arguments against giving an affirmative claim in these circumstances, arguments we have already discussed in another context.[29] We would include the possibility of such an affirmative claim in our recommendation.

(d) Cases Other Than Improvements

We note that there may be cases of wrongful interference where a restitutionary allowance might be appropriate but where no improvement was made. One, which was suggested in a judgment of Laskin J.A. (as he then was), was the movement by tow truck to a place of safe keeping of the plaintiff's automobile left in the defendant's car park.[30]

We decided against providing for these cases under our previous recommendations. This is because the element of benefit to the person required to make the allowance in these cases is not as unambiguous as it appears to be in the improvement cases. We would leave this area to further common law development.

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[28] See Sacks, *supra*, note 15, at 716, referring to German law where such claims are apparently possible.

[29] See our discussion of the issue in connection with our lack of fault defence, in ch. 11, above.

[30] *Regina* v. *Howson* (1966), 55 D.L.R. (2d) 582 (Ont. C.A.), at 593.

CHAPTER 16

A REMEDIES FOR WRONGFUL INTERFERENCE WITH GOODS ACT

1. REFORMING LEGISLATION FOR WRONGFUL INTERFERENCE CASES

We have throughout this Study Paper made a number of proposals for reform that range from the relatively minor to the fairly radical. We have also indicated at a number of points that this is an area characterized by relatively little expository attention in Canada, relatively thin modern case law treatment, and relatively unelaborate judicial treatments when such treatments do occur.

Against this background, we considered that reform by statute was warranted, even where the positions we commended were not unattainable by common law development. In this chapter, we elaborate upon the statute we have in mind. A draft of the statute is Appendix 1 to this Study Paper.

The statute we have in mind would have four basic components. The first would be definitions. The second would formally emphasize the unity of the forms of relief in this area. The third would provide for reforms common to all such forms of relief. The fourth would provide for reform for particular types of relief and conduct.

2. DEFINITIONS

There would be two particularly important terms in the *Act*. One would be "wrongful interference with goods"; the other would be "relief" (for such interference). Those would be defined so as to include conduct covered by all causes of action and interim and final forms of relief, including defences to liability arising out of recaption.[1]

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[1] See *Judicial Review Procedure Act*, R.S.O. 1980, c. 224, s.1.

We would note here that we would not endeavour to provide a detailed definition of "goods". We note that the English *Torts (Interference With Goods) Act 1977* does not provide any definition at all. The English Law Reform Committee in its *Eighteenth Report (Conversion and Detinue)* saw goods as restricted to the existing subject matter of conversion, detinue and trespass; the Committee thought this would involve the specific exclusion of land, money, choses in action and intellectual property.[2] It seems to us simpler to provide that goods are those things in respect of which actions under the property torts could be brought. To this extent we would restrict the scope of our *Act* by reference to the property torts.

3. GENERAL REMEDIAL RULE

This will state that any proceeding in the nature of any of the specific ones described under the definition of "wrongful interference with goods", such as trespass, conversion, detinue or injury to a reversionary interest, shall be deemed to be an action for relief for wrongful interference with goods.[3] The rule will go on to say that in cases of wrongful interference with goods, the court shall grant such relief as the court considers appropriate, including such relief as the claimant would, apart from this *Act*, have been entitled to.[4]

4. GENERAL REFORM PROVISIONS

There would be provisions enacting reform common to all proceedings for relief for wrongful interference with goods.[5] Those reforms comprise our contribution, contributory negligence, *jus tertii* and improvements proposals. As we indicated in chapter 13, our proposed provisions on the first two areas are meant simply to make clearer the nature of the reforms we commend. We would anticipate that our proposals on contribution and contributory negligence, if accepted, would in fact be effectuated by the province's contribution and contributory negligence statute as part of its general provisions. The reform of those provisions is the subject of the Ontario Law Reform Commission's *Report on Contribution Among Wrongdoers and Contributory Negligence*.[6]

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[2] Cmnd. 4774 (1971), paras. 29, 30.

[3] See *Judicial Review Procedure Act*, *supra*, note 1, ss. 7, 12. We note that this provision would also work on other statutes employing the existing terminology.

[4] *Ibid.*, ss. 2, 9.

[5] *Ibid.*, ss. 3 - 5.

[6] Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (1988).

5. PARTICULAR REFORM PROVISIONS

There would be provisions guiding the court in relation to particular forms of relief and particular forms of conduct.[7] For recovery *in specie*, there would be provisions to give effect to our proposals for interim and final recovery *in specie*, including its availability to persons without possessory rights. For damages, there would be a provision to give effect to our proposal concerning recovery by persons with limited interests as if they were owners. For defences to liability otherwise arising, there would be provisions to give effect to our proposals concerning recaption.[8] For relief for what would be apart from this *Act* trespass, conversion, detinue and injury to a reversionary interest, there would be provisions giving effect to our proposals with respect to those torts.

We would note here that our proposals concerning limitation of actions, which would operate directly on proceedings which would apart from our *Act* be conversion, will also operate directly on all forms of relief for wrongful interference with goods. This is because of our proposal concerning the effect of the expiry of the relevant period on title. However, we would have the relevant provisions appear in the province's limitations legislation, not in our *Act*. As the bulk of the provisions in question simply follow previously published reform proposals or enacted legislation elsewhere, we did not think it necessary to provide our own drafts.

6. APPLICATION OF THE ACT OUTSIDE LIABILITY IN TORT

We have outlined reforms whose focus is liability in tort. This is with the exception of liability arising on a waiver of tort, and of a number of our proposals which are meant to affect the operation of contracts. An example of a proposal of the latter type is our lack of fault defence. We noted that liability arising out of bailment may not properly be said to sound in tort, but rather to be *sui generis*.[9] Our *jus tertii* proposals in particular are meant to have an impact in the bailment area, which might make it desirable to provide for explicit extension to bailments of that proposal at least.

We also considered whether all of our *Act*'s provisions should be extended to liability arising out of bailments and of contracts whose subject matter is goods.[10] We note that the *Torts (Interference with Goods) Act 1977*

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[7] See *Judicial Review Procedure Act*, *supra*, note 1, ss. 7, 8.

[8] We were concerned about the question of the compliance of these recaption provisions with the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982*, c.11 (U.K.). The memorandum on the subject prepared by Professor Paciocco is Appendix III to this Study Paper. His conclusion, which we share, is that our recaption recommendations comply with the *Charter*.

[9] See N. E. Palmer, *Bailment* (1979), at 52-62.

[10] Cf. N. E. Palmer, "The Application of the Torts (Interference with Goods) Act to Actions in Bailment" (1978) 41 Mod. L. Rev. 629.

is restricted to tort liability. The major impact of the suggested change might seem to be on liability for breach of contract, given the kinship between liability arising out of bailment and tort, especially detinue.

But in fact all of our proposals of general import are subject to contrary agreement (our *jus tertii* proposal), or exclude contrary agreement or contractual provisions (our lack of fault defence and recaption proposals), or allow the court discretion to weigh agreements or contractual provisions (recovery *in specie* and improvements), or would not appear to have any impact on liability for breach of contract in any event (recovery of possession or damages by a person with a limited interest as if he were owner). The exceptions are our contributory negligence and contribution schemes, where we would leave the matter of the impact of contract or contrary agreement to other law, and where we would not want to pass on liability in contract.[11]

We thus see no objection to our scope provision applying the term "wrongful interference" to all conduct constituting interference with goods giving rise to liability, including breach of contract and liability arising out of a bailment, subject to the provisions of our *Act*. Such a scope provision would help ensure that the effect of our *Act* is not subverted by re-characterization of the relevant proceeding in ways which would owe more to the forms of action than to current legal needs.[12]

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[11] On the general issue, see *Report on Contribution Among Wrongdoers and Contributory Negligence*, *supra*, note 6, ch.4, sec.3(b).

[12] See the examples collected in Palmer, *supra*, note 10.

CHAPTER 17

OTHER ISSUES IN WRONGFUL INTERFERENCE LAW

1. INTRODUCTION

In this chapter we deal in a fairly summary way with two matters which we considered, but upon which we have no substantive recommendations to make.

One primarily implicates questions of title to goods, and as such is outside the scope of the Study Paper. This is the matter of mingled, annexed or manufactured goods. It was not discussed at all by the English Law Reform Committee in the *Eighteenth Report (Conversion and Detinue)*,[1] although its proposals on compensation for improvements affected the area.

The other matter we also considered to be distinct from the main issues in our Study. This was the question of the rules, largely in statutory form, concerning unclaimed articles. This matter was reviewed in the *Eighteenth Report*, and reform enacted in the English *Torts (Interference with Goods) Act 1977*.

While we have no recommendations for reform in relation to these matters, we nevertheless thought it appropriate to make mention of them here. This is because what consideration we were able to give them suggests further study of them is warranted.

2. *ACCESSIO*, *SPECIFICATIO* AND *CONFUSIO*

(a) INTRODUCTION

These cover three different categories of situation involving conjoined, mingled or transformed goods.[2] The categories are taken from Roman law.

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[1] Cmnd. 4774 (1971).

[2] R. Slater, "Accessio, Specificatio and Confusio: Three Skeletons in the Closet" (1959) 37 Can. Bar Rev. 597.

Accessio or accession situations are ones where one or more chattels are attached to another or others without loss of their separate identities. The authorities have in modern times been particularly concerned with attachments to automobiles.

Specificatio or specification situations are ones where a new article is made from another by labour and possibly the addition of further goods. Manufacture is an obvious example.

Finally, *confusio* or intermingling situations are ones where goods are mixed together such that, although there is no change in their physical characteristics, it is no longer possible to distinguish the constituent goods by origin. The mixing of different shipments of the same type and grade of wheat is an example.

The authorities in these areas are not plentiful. Much of the law seems to be unclear. And a measure of additional complication is represented by rules for all three situations in the *Personal Property Security Act, 1989*[3] which to some extent seem to be at variance with the common law position.

There are in fact two separate issues here. One concerns the matter of title in the product or mass which results in these situations. This we consider to be squarely outside this Study Paper. The other issue concerns compensation to an involuntary contributor to the product or mass, title to which is located in another. Our earlier recommendations on improvements will have an impact here.

(b) The Title Issue

The issue of title at common law has not been clearly resolved. It may depend on two factors.[4]

One factor, on which there seems to be a measure of agreement, is whether the constituent goods are separable. If they are, and the goods contributed by the claimant can be identified, he retains title to them. If the goods are separable, but no such identification is possible, as in *confusio* or intermingling situations, he takes a proportionate interest in the mass, and can take possession of the appropriate quantity.

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[3] *Personal Property Security Act, 1989*, S.O. 1989, c. 16, ss. 35, 37.

[4] See the analysis D. Paciocco, Ontario Law Reform Commission Research Paper II, *Self-Help Remedies: Recaption of Chattels; Contractual Rights* (1982), at 128-36. For the view that the following analysis, based as it is on ideas drawn from Roman law, is misconceived for the common law, see P. Matthews, "Proprietary Claims at Common Law for Mixed and Improved Goods" [1981] C.L.P. 159, and by the same author, "'Specificatio' in the Common Law" (1981) 10 Anglo. Am. L. Rev. 121.

If the goods are not separable, there is no agreement on the correct rule. There is support for the proposition that the party whose chattel is more valuable than the other takes title.[5] There is also support for the proposition that the parties simply rank equally in proportion to their respective contributions.[6]

The common law is also not altogether clear on the application of the factors described. Various tests have been suggested for separability, with the one commanding the most support being whether the claimant's goods can be removed without causing destruction or serious injury to the other goods.[7] The application of the principal contribution or respective contributions test raises the question whether the value of the labour contributed as well as any goods should be taken account of. The answer to this question is unclear, with at least one author suggesting that if the manufacturer contributes no goods of significant value to the claimant's goods, which are transformed in the process of manufacture, the manufacturer takes title.[8]

The *Personal Property Security Act, 1989* would yield its own set of solutions where security interests in constituent goods are concerned. Where it is possible to identify the constituent goods, the security interest in them will generally speaking have priority over any other claim in the whole, if the security interest attached before the goods were added to the whole.[9] Separability is relevant to the issue of compensation for removal of the goods. If the removal of the goods causes physical injury to the whole, the remover must compensate any encumbrancer or owner of the whole who is not the debtor.[10]

Where goods subject to a security interest which has been perfected become part of a product or mass such that their identity is lost in it, the security interest continues in the product or mass. If more than one security interest attaches to the product or mass, they all rank equally in the ratio of the respective costs of the subject goods to the total cost of the product or mass.[11] This leaves room for labour and overhead.[12]

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[5] See A. Guest, "Accession and Confusion in the Law of Hire Purchase" (1964) 27 Mod. L. Rev. 505 and authorities he cites.

[6] R. Goode, *Hire Purchase Law and Practice*, 2nd ed. (1970), at 759, and authorities he cites.

[7] See Guest, *supra*, note 5, at 507-09 (on the various tests); and *Firestone Tire & Rubber Co.* v. *Industrial Acceptance Corporation*, [1971] S.C.R. 357.

[8] See Goode, *supra*, note 6, at 759 n.12.

[9] S. 35 (1).

[10] S. 35 (4).

[11] S. 37.

[12] See R. Macdonald and R. Simmonds, "The Financing of Moveables: Law Reform in Quebec and Ontario", *Meredith Memorial Lectures 1981: New Developments in Commercial Lending* (1982), 246, at 299.

We note that the common law has not squarely confronted the issue of what type of title is acquired under the rules which shift title in these situations. One possibility is that any title acquired (as in the manufacture situation described) is a voidable one, so that an innocent purchaser from the acquiror of such voidable title would not be liable to compensate the contributor of the goods.[13] But the position is hardly clear, particularly where the original acquiror acted in bad faith, where arguably the purchaser should be liable for conversion, but able to claim an allowance for the value contributed by the original acquiror.[14]

We consider that the law in all these situations should be clarified. We also consider that in the process of working out a clearer regime, careful account should be taken of the rules in the *Personal Property Security Act, 1989*.

(c) The Issue of Compensation for Loss of Title

Some of the issues here were in fact raised when we discussed the present legal rules as to compensation for improvements. The regime we recommended there, of a discretionary allowance to claimants who acted reasonably, would not apply, of course, where the claimant with an original interest in the attached goods did not do the attaching, and did not derive title from the attacher. The claimant in that case would have an action for conversion, against the attacher at least.[15] We have no difficulty with this. But again we would mention the problem of whether the claimant would have an action against a subsequent purchaser from the attacher. This goes to one of the title issues which we suggest deserves further study.

3. UNCLAIMED ARTICLES

The situation here involves a bailee, such as a warehouseman, holding goods not collected at the appointed time. The position of involuntary bailees—typically, consumers who receive unsolicited goods, or, in the reported cases, innocent persons used as a part of a fraud worked on the true owner—seems well enough regulated at common law[16] and under the

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[13] Cf. Slater, *supra*, note 2, at 606-07; Goode, *supra*, note 5, at 759 n.12; and *1 Am. Jur. 2d.* (1962), "Accession and Confusion", sec. 11.

[14] Cf. R. Brown, *Personal Property*, 2nd ed. (1956), at 61-62; but cf. *Greer* v. *Faulkner* (1909), 40 S.C.R. 399, at 406-407, *per* Idington J. (no allowance).

[15] See *Clerk & Lindsell on Torts*, 15th ed., by A.L. Armitage and R.W.M. Dias (1982), para. 21-32.

[16] On the common law, see J. G. Fleming, *The Law of Torts*, 7th ed. (1987), at 55-56; *Long* v. *R.* (1922), 63 D.L.R. 134 (Ex. Ct.); *Swale* v. *Canadian Pacific Railway* (1913), 29 O.L.R. 634 (C.A.); and *R.* v. *Hewson* (1966), 55 D.L.R. (2d) 582 (Ont. C.A.), at 594, *per* Laskin J.A.

Consumer Protection Act.[17] Under the latter *Act* consumers are given wide powers to deal with the goods without accountability to the true owners, known or unknown. At common law, if the involuntary bailee acts reasonably in caring for and attempting to return the goods, he will escape liability.

The common law is, however, of little assistance to the voluntary bailee who wants to be relieved of the unpaid burden of unwanted custody.[18] There is very recent legislation in Ontario, the *Repair and Storage Liens Act, 1989*[19] which repeals the *Unclaimed Articles Act*[20] and the *Warehousemen's Lien Act*.[21] The *Repair and Storage Liens Act, 1989* applies to any article[22] which is repaired[23] or stored[24] and provides for possessory liens,[25] and non-possessory liens[26] which utilize[27] the registry system of the *Personal Property Security Act, 1989*.[28] The Act provides a comprehensive scheme of priorities,[29] enforcement remedies,[30] and procedures for dispute resolution.[31] It is particularly noteworthy that lienholders under this Act take priority over other interests in the article (except a person claiming a possessory lien[32]) including the interest of a true owner who may not have authorized the creation of the lien, and, further, a disposition of the article

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[17] R.S.O. 1980, c.87, s. 46. It is not completely clear that it excludes liability in conversion; given conversion's conceptual basis, it is probably covered.

[18] See N.E. Palmer, *Bailment* (1979), at 395-96.

[19] S.O. 1989, c.17.

[20] R.S.O. 1980, c.261.

[21] R.S.O. 1980, c.529.

[22] "'[A]rticle' means an item of tangible personal property other than a fixture;": s.1.

[23] "'[R]epair' means an expenditure of money or the application of labour, skill or materials, to an article for the purpose of altering, improving or restoring its properties or maintaining its condition and includes, (a) the transportation of the article for purpose of making a repair, (b) the towing of an article, (c) the salvage of an article;": s.1.

[24] "'[S]torer' means a person who receives an article for storage or storage and repair on the understanding that the person will be paid for the storage or storage and repair, as the case may be.": s.1.

[25] Ss. 3-6.

[26] Ss. 7-14.

[27] S. 9(1).

[28] S.O. 1989, c. 16.

[29] Ss. 6, 7.

[30] Ss. 15-22.

[31] Ss. 23-31.

[32] S. 7(3).

by a lienholder pursuant to the sale provisions of the Act[33] gives a purchaser title free of the interests of even such a true owner.[34]

We note that this new legislation cures a number of the apparent defects of the former *Unclaimed Articles Act*. In particular, it broadens the scope of the relief available. We would add that we received no complaints about the operation of the predecessor legislation.

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[33] S. 16.

[34] S. 20.

SUMMARY OF RECOMMENDATIONS

1. A REMEDIES FOR WRONGFUL INTERFERENCE WITH GOODS ACT

The existing causes of action and defences for wrongful interference with goods should be gathered into a *Remedies for Wrongful Interference with Goods Act*, to be modelled on the *Judicial Review Procedure Act*, R.S.O. 1980, c.224.

2. CONTRIBUTORY FAULT PRINCIPLE FOR WRONGFUL INTERFERENCE ACTIONS

The law of the province should provide that, where a claimant for relief for wrongful interference has been found to be contributorily at fault, the court should apportion any monetary relief granted. A corresponding provision should be made for an allowance in cases where the goods have been recovered, either by judicial order or by self-help. This provision should be under the province's general law on contributory fault. (An illustrative provision is included for the purpose of consideration in the proposed *Remedies for Wrongful Interference with Goods Act*.)

3. CONTRIBUTION PRINCIPLE FOR WRONGFUL INTERFERENCE ACTIONS

The law of the province should provide for contribution between wrongdoers each of whom contributed to the wrongful interference of the contribution claimant. This provision should be under the province's general law on contribution, and should give the court wide discretion in determining the contribution, so that, in determining liability, the court should be able to take account of the position of each wrongdoer's transaction in any chain of transactions between the true owner and the claimant. (An illustrative provision is included for the purpose of consideration in the proposed *Remedies for Wrongful Interference with Goods Act*.)

4. *JUS TERTII* DEFENCE FOR WRONGFUL INTERFERENCE ACTIONS

The proposed *Remedies for Wrongful Interference with Goods Act* should provide, in all wrongful interference actions, whether based on

possession or not, for a *jus tertii* defence (the right of a third party) with the following characteristics:

(a) the third party should be identified, and provision made for joining him as a party to the action;

(b) if the third party is not joined, or, being joined, fails to defend, or disclaims an interest, the defence should not be sustainable; but in the last two cases the court may deprive the third party of any right of action against the defendant;

(c) the plaintiff should give particulars of his right or title and identify anyone who to his knowledge has or claims any interest in the goods;

(d) the plaintiff holds the proceeds of the action in trust for any third party who was not joined but who has a better right to the interest on which the plaintiff relied;

(e) where any third party who is not barred from doing so later sues the defendant, the defendant may claim an indemnity from the original plaintiff; and

(f) the *jus tertii* defence should be subject to contrary agreement.

5. ALLOWANCE FOR IMPROVEMENTS TO GOODS WRONGFULLY INTERFERED WITH

The proposed *Act* should provide that, where the goods have been improved, the court may make an allowance to a person who wrongfully interfered with the goods who was the improver or was a purchaser who derived title from the improver and who acted reasonably, in accordance with the following:

(a) the court should be provided with guidelines to assist it in determining reasonableness and whether or not to exercise its discretion;

(b) the court may make an allowance in the form of an order for physical separation of the improvements, and in making a monetary allowance shall award the lesser of the cost or value of the improvements, unless it considers this would be unfair to the person receiving the allowance; and

(c) in an action by a purchaser of improved goods against his seller based on failure of consideration, or for damages, the court shall make an allowance where appropriate.

6. DEFENCE FOR REASONABLE BELIEF IN ACQUISITION OF INTEREST

The proposed *Act* should provide for a defence that the defendant reasonably believed he had or was acquiring a legally recognized interest in the goods, subject to the following:

(a) the defence should not be available for merchants as that term is defined in the Ontario Law Reform Commission's *Report on Sale of Goods*;

(b) the defence should also be available in claims for contribution or for damages for breach of contract; and

(c) the defence should not prevent the recovery of the goods, but should require the court to make an allowance to the person from whom they were recovered equal to the lesser of the cost or the value of the goods.

7. RIGHT TO RECOVERY *IN SPECIE* WHETHER OR NOT RIGHT TO POSSESS

The proposed *Act* should provide that in an action for wrongful interference with goods a party may claim recovery of possession whether or not he has a right to immediate possession, subject to the following:

(a) he cannot be awarded possession where it is shown that some other person with an interest in the goods objects;

(b) subject to the Rules of Civil Procedure the person so objecting may be joined as a party to the action; and

(c) the successful party shall receive and hold the goods in trust for all persons with interests therein.

8. *PRIMA FACIE* RIGHT TO RECOVERY *IN SPECIE*

The proposed *Act* should provide that a successful party to an action for wrongful interference who has claimed recovery of possession shall be entitled, at his option, to an order for recovery unless the court is satisfied that some other disposition is more appropriate, the burden of which shall be on the party resisting the order. The court should be provided with guidelines to assist it in determining when some other disposition would be more appropriate.

9. INTERIM RECOVERY OF GOODS

The proposed *Act* should provide that, upon a showing of a *prima facie* case of wrongful interference with goods, the court shall make an order for interim recovery of goods unless satisfied that some other disposition is more appropriate. The court should be provided with guidelines to assist it in the exercise of such discretion.

10. CLARIFICATION OF SECTION 117 (2) OF THE *COURTS OF JUSTICE ACT, 1984*

Section 117(2) of the *Courts of Justice Act, 1984* should be clarified to indicate:

(a) that a moving party who is successful on a motion for interim recovery of goods, and is unsuccessful in the action, may be held liable in damages for any loss caused by the interim recovery of goods sustained by another party;

(b) conversely, a party who obtains possession of goods by setting aside an interim order and is unsuccessful in the action, may be liable in damages to the same extent as a moving party who obtains possession by virtue of an interim order.

11. AMENDMENT OF RULE OF CIVIL PROCEDURE 44.03

Rule of Civil Procedure 44.03 should be amended to clarify the court's power to order interim recovery of goods upon the moving party giving an undertaking as to damages.

12. USE OF FORCE BY SHERIFF IN ENFORCEMENT OF INTERIM AND FINAL ORDERS FOR RECOVERY OF POSSESSION

The law concerning the use of force by the sheriff in the enforcement of interim and final orders for recovery of possession should be the same as that concerning the use of force by him in the execution of process for the recovery of judgment debts as recommended in the Ontario Law Reform Commission's *Report on the Enforcement of Judgment Debts and Related Matters*, Part II (1981).

13. AMENDMENT OF RULE OF CIVIL PROCEDURE 44.07 (2)

Rule of Civil Procedure 44.07(2) should be amended to provide that the sheriff shall serve a copy of the order on the defendant and any person who to his knowledge or reasonable belief claims an interest in the goods.

14. EXAMINATION OF DEFENDANT WHERE SHERIFF ORDERED TO POSSESS GOODS

The power of the court to order the examination of the defendant or any other person should be made clear in cases where the sheriff is ordered to take possession of goods pursuant to an interim or final order for recovery of possession.

15. RECAPTION GENERALLY NO DEFENCE FOR INTERFERENCE WITH LAND OR GOODS

The proposed *Act* should provide that, subject to recommendation 16, in any action for interference with property, real or personal, it shall be no defence that the interference took place in the course of taking possession of goods the refusal to deliver possession of which would be a wrongful interference with the goods on the part of the person from whom the goods were taken or to be taken.

16. RECAPTION GENERALLY DEFENCE TO NOMINAL DAMAGES FOR TRESPASS TO LAND OR GOODS

The proposed *Act* should provide that, subject to recommendation 17, in any action for interference with property, real or personal, which is in the nature of an action for nominal damages arising out of trespass to goods or land *per se*, it shall be a defence that the interference took place in the course of taking possession of goods the refusal to deliver possession of which would be a wrongful interference with the goods on the part of the person from whom the goods were taken or to be taken.

17. RECAPTION NO DEFENCE TO NOMINAL DAMAGES ARISING OUT OF ENTRY INTO DWELLING

The proposed *Act* should provide that the defence established in recommendation 16 shall not be available in circumstances where the interference with property is entry into a dwelling house.

18. RECAPTION NO DEFENCE FOR INTERFERENCE WITH THE PERSON

The proposed *Act* should provide that, in any action for interference with the person, it shall not be a defence that the interference took place in the course of taking possession of goods the refusal to deliver possession of which would be a wrongful interference with the goods on the part of the person from whom the goods were taken or to be taken.

19. RIGHT TO DEFEND PEACEABLE POSSESSION EXCEPT AGAINST PERSON ENTITLED TO GOODS

The proposed *Act* should provide that a person in peaceable possession of goods shall be justified in using reasonable and necessary force in defence of that possession except against a person or someone acting by that person's authority the refusal to deliver possession of the goods to whom would be a wrongful interference with the goods.

20. RECAPTION RULES NOT WAIVABLE IN ADVANCE

The proposed *Act* should provide that the provisions of the sections concerning recaption (recommendations 15 through 19) shall operate notwithstanding any licence or consent, express or implied, granted or given prior to the commencement of an attempt to take possession of goods.

21. RECOVERY BY PERSON WITH POSSESSION OR RIGHT TO SAME AS IF OWNER

The proposed *Act* should provide that, in an action for wrongful interference with goods, any person with possession or the right to immediate possession should be able to claim monetary relief as if he were the owner of the goods, subject to the following:

(a) he shall not so recover to the extent that another interest holder objects;

(b) subject to the Rules of Civil Procedure the person so objecting may be joined as a party to the action; and

(c) the person with possession or the immediate right to possession shall receive and hold the proceeds of the action in trust for all persons with interests therein.

A similar provision should be made for a person proceeding with the written authority of another interest holder. Apart from these provisions, the proposed *Act* should provide that a person should only recover monetary relief for interference with his own interest.

22. RIGHT TO IMMEDIATE POSSESSION SUFFICIENT FOR TRESPASS CLAIMS

The proposed *Act* should provide that a right to immediate possession should be sufficient for actions for wrongful interference in the nature of trespass.

23. INTEREST SUFFICIENT FOR CONVERSION SUFFICIENT FOR DETINUE AND *VICE VERSA*

The proposed *Act* should provide that an interest sufficient for actions for wrongful interference in the nature of conversion should be sufficient for ones for wrongful interference in the nature of detinue, and *vice versa*.

24. REVERSIONARY INTEREST SUFFICIENT FOR CONVERSION CLAIM

The proposed *Act* should provide that a reversionary interest should be sufficient for an action for wrongful interference in the nature of conversion.

25. DELIVERY OR RECEIPT IN PLEDGE SUFFICIENT FOR CONVERSION

The proposed *Act* should provide that an interference with goods in the nature of a delivery or receipt by way of pledge should be sufficient interference for an action for wrongful interference in the nature of conversion.

26. WRONGFUL INTERFERENCE CLAIMS BY CO-OWNERS

The proposed *Act* should provide that a co-owner of goods may bring an action for wrongful interference if the interference would have been sufficient for such an action by him if he were the sole owner.

27. TWO YEAR LIMITATION PERIOD FOR GOOD FAITH INTERMEDDLERS WITH GOODS

The limitations of actions legislation of the province should provide that the limitation period for actions for wrongful interference with goods by persons without possession, against persons who were good faith purchasers of the goods for value, should be two years from the date of the first transaction in the chain of transactions leading to the defendant which, apart from the *Act*, would be styled a conversion, or the defendant's wrongful interference, whichever is the earlier.

28. RUNNING OF TIME FROM FIRST DISPOSITION OR DEFENDANTS INTERFERENCE

Subject to recommendation 27, the limitations legislation should provide that in actions for wrongful interference with goods by persons without

possession the relevant limitation period should run from the date of the first transaction in the chain of transactions leading to the defendant which, apart from the *Act*, would be styled a conversion in the form of a disposition to a good faith purchaser for value, or the defendant's wrongful interference, whichever is the earlier.

29. EXPIRY OF LIMITATION PERIOD AND TITLE

The limitations legislation should provide that the expiry of the relevant limitation period for an action for wrongful interference with goods which, apart from the *Act*, would be styled a conversion, including an action by a holder of a reversionary interest, shall extinguish the title of a person without possession otherwise entitled to bring the action as against, but only as against, the person entitled to the benefit of the relevant period.

30. LIMITATION PERIODS NOT TO AVAIL THIEF OR RECEIVER

The limitations legislation should provide that a thief or receiver of stolen goods shall not be entitled to the benefit of any limitation period in respect of the goods stolen.

31. AMENDMENT TO *LANDLORD AND TENANT ACT*

Part IV of the *Landlord and Tenant Act*, R.S.O. 1980, c.232, should be amended to give a judge of the District Court power to hear a tenant's application for recovery of possession of goods or of their value from a landlord who wrongfully interfered with the tenant's goods.

32. AMENDMENT TO *CONSUMER PROTECTION ACT*, SECTION 23(1)

The *Consumer Protection Act*, R.S.O. 1980, c. 87, section 23 (1) should be amended to make it clear that the protection of section 23 (1) extends to security interests under the *Personal Property Security Act, 1989*, S.O. 1989, c. 16, s. 62(a).

33. *ACCESSIO*, *CONFUSIO* AND *SPECIFICATIO* ISSUES

Further study should be undertaken concerning effects on title to goods where they are attached to, mingled with, or transformed into other goods—sometimes called *accessio*, *confusio*, and *specificatio*.

APPENDIX 1

AN ACT TO PROVIDE FOR REMEDIES FOR WRONGFUL INTERFERENCE WITH GOODS

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

SECTION 1: DEFINITIONS

1. In this Act, unless the context otherwise requires,

(a) "goods" means those things in respect of which apart from this Act any of the torts referred to in subparagraphs (c)(i)–(iv) of this section could be committed;

(b) "relief" means

(i) damages or other monetary relief, including an order to account;

(ii) defences to liability which might otherwise arise when there is a retaking or recaption of goods;

(iii) recovery of possession of goods; and

(iv) any other remedy which the court considers it appropriate to grant, including without limiting the generality of any of the foregoing declarations and injunctions.

(c) "wrongful interference" or "wrongful interference with goods" means

(i) conversion of goods;

(ii) detinue;

(iii) trespass to goods;

(iv) injury to a reversionary interest in goods;

(v) negligence so far as it results in loss or destruction of or damage to goods or to an interest in goods; and

(vi) any other conduct for which the court considers it appropriate to grant relief so far as that conduct results in loss or

destruction of or damage to or other interference with goods or an interest in goods, including without limiting the generality of any of the foregoing conduct giving rise to liability out of a bailment and for breach of contract.

SOURCE: *Torts (Interference with Goods) Act 1977*, s.1; *Judicial Review Procedure Act*, s. 1.

REFERENCE: Study Paper, ch. 16, sec. 2; Recommendation 1.

SECTION 2: APPLICATION TO WAIVER OF TORT

2. For greater certainty, the provisions of this Act apply to claims for relief in respect of a benefit derived from an interest in goods which belonged to the claimant which might apart from this Act be styled a claim based on a waiver of tort.

SOURCE: New.

REFERENCE: Study Paper, ch. 5, sec. 2; Recommendations 1 & 2.

SECTION 3: CHARACTERIZATION OF WRONGFUL INTERFERENCE CLAIMS

3.—(1) All actions in which a claim for relief for wrongful interference with goods is made shall to that extent be deemed to be actions for wrongful interference with goods.

(2) Subject to the provision of this Act, a claimant for relief for wrongful interference with goods in an action for wrongful interference with goods shall be entitled to all or any of the relief to which apart from this Act he would be entitled, or such other relief as the court considers appropriate in the circumstances, or any combination thereof.

SOURCE: *Judicial Review Procedure Act*, ss. 2, 7 & 9.

REFERENCE: Study Paper, ch. 5, sec. 2 and ch. 16, sec. 2; Recommendation 1.

SECTION 4: CONTRIBUTORY FAULT IN WRONGFUL INTERFERENCE CASES[1]

4.—(1) In an action for wrongful interference with goods, if fault or negligence is found on the part of the claimant for relief that contrib-

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[1] Note that this provision is included for the sake of illustration only: we would recommend that the principles of this provision should be given effect to in the province's general law on contributory fault.

uted to the wrongful interference, the court shall reduce any monetary relief by such amount as the court considers just and equitable having regard to the culpability of each party's conduct and its contribution to the wrongful interference.

(2) In determining culpability under this section, the court shall take account of, without being limited to, the risks created by each party's conduct and his knowledge or means of knowledge thereof.

(3) In determining under this section the contribution of each party's conduct to the wrongful interference the court shall take account of, without being limited to, that conduct's causative importance in relation thereto.

(4) Where the claimant for relief is found to be entitled to recovery of possession, and subsection (1) of this section otherwise applies, the court shall not make a final order for such relief without awarding to the person from whom recovery is ordered an amount equal to the amount by which otherwise the claimant's monetary relief would have been reduced under subsection (1) of this section.

(5) Where goods have been recovered without a final order for recovery of possession, the person from whom they were so recovered may, in addition to any other claim to a reduction under subsection (1) of this section, claim the amount to which he would otherwise have been entitled had a final order for recovery of possession been made.

(6) Subject to the provisions of this section, it shall be deemed to be an application of section 2 of the *Negligence Act*.

(7) Notwithstanding any other provision of this Act, this section shall be subject to contrary agreement or contract and shall apply to liability on causes of action for breach of contract only if section 2 of the *Negligence Act* is so subject and so applies.

SOURCE: *Negligence Act*, s. 2.

REFERENCE: Study Paper, ch. 13, sec. 2, and ch. 16, sec. 6; Recommendation 2.

SECTION 5: CONTRIBUTION IN WRONGFUL INTERFERENCE CASES[2]

5.—(1) Where two or more persons are liable to a claim for relief by the same person in an action for wrongful interference relating to the

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[2] Note that this provision is included for the sake of illustration only: we would recommend that the principles of this provision should be given effect to in the province's general law on contribution. If such legislation used as the touchstone for apportionment the "just and equitable" notion, then the specification of the basis of apportionment in our provision would not be necessary.

same goods, although not necessarily the same wrongful interference, and the wrongful interference of each contributed to the wrongful interference by the person seeking contribution under this section, then as between such persons, each is liable to make contribution to the other having regard to the degree of culpability of the conduct of each which is wrongful interference and its contribution to the liability in respect of which contribution is claimed.

(2) In determining culpability under this section, the court shall take account of, without being limited to, the risks created by each party's conduct and his knowledge or means of knowledge thereof.

(3) In determining under this section the contribution of each party's conduct to the liability in respect of which contribution is claimed, the court shall take account of, without being limited to, that conduct's proximity to the last transaction with the person to whom each party is liable under subsection (1) of this section, as part of that conduct's causative importance in relation to the liability in respect of which contribution is being claimed.

(4) The liability in respect of which contribution may be claimed under this section shall be measured by reference to the value of the relief granted in any action for wrongful interference with the goods against the contribution claimant.

(5) Where goods have been recovered without a final order for recovery of possession, the person from whom they were so recovered shall be able to claim contribution by reference to the amount to which he would otherwise have been entitled had a final order for recovery of possession been made, in addition to any other amount by reference to which he may claim.

(6) Subject to the provisions of this section, it shall be deemed to be an application of section 4 of the *Negligence Act*.

(7) Notwithstanding any other provision of this Act, this section shall be subject to contrary agreement or contract and apply to liability on causes of action for breach of contract only if section 4 of the *Negligence Act* is so subject and so applies.

SOURCE: *Negligence Act*, s. 4.

REFERENCE: Study Paper, ch. 13, sec. 3, and ch. 16, sec. 6; Recommendation 3.

SECTION 6: RIGHT TO PLEAD THE TITLE OF ANOTHER (THE *JUS TERTII*)

6.—(1) The person against whom a claim is made in an action for wrongful interference with goods shall be entitled, subject to the

provisions of this section, to plead that an identified other person has a better right or title than the claimant as respects all or any part of the interest alleged by the claimant, or in right of which he claims.

(2) Subject to the Rules of Civil Procedure, the court shall order that the other person referred to in subsection (1) of this section be joined as a party to the action.

(3) The court may, where the other person referred in subsection (1) of this section is joined as a party to the action or, being joined, fails to defend or disclaims an interest, deprive him of any right of action against the person against whom the claim is made, either unconditionally, or subject to such terms or conditions as may be specified.

(4) Where the other person referred in subsection (1) of this section is joined as a party to the action and appears and disclaims any interest, or fails to defend, or is not made a party to the action, the person raising the defence referred to in subsection (1) shall, unless the court otherwise orders, not be entitled to continue therewith.

(5) The provisions of this section are subject to contrary agreement, express or implied, between the claimant and the person against whom the claim is made.

SOURCE: *Torts (Interference with Goods) Act 1977*, s.8.

REFERENCE: Study Paper, ch. 12; Recommendation 4.

SECTION 7: PARTICULARS OF TITLE AND OF ANY *TERTIUS*

7.—(1) The claimant in any action for wrongful interference with goods shall in his pleadings give particulars of his right or title.

(2) The claimant in any such action shall also identify in his pleadings any person who to his knowledge has or claims any interest in the goods the subject of the action.

SOURCE: *Torts (Interference with Goods) Act 1977*, s.8.

REFERENCE: Study Paper, ch. 12; Recommendation 4.

SECTION 8: DOUBLE LIABILITY ISSUES

8.—(1) Where another person has a better right or title than the successful claimant in an action for wrongful interference with goods, but the other person was not joined as a party to the action, the successful claimant shall hold in trust for that other person that portion of the proceeds of the action which the other person might have recovered had he brought the action or joined it.

(2) Where the other person referred to in subsection (1) of this section who is not barred from so doing brings an action for wrongful interference with goods against the person against whom the successful claim referred to in that subsection was made, that person shall be entitled to an indemnity from the original successful claimant, either in that other person's action, or in subsequent proceedings.

SOURCE: *Torts (Wrongful Interference with Goods) Act 1977*, ss. 7 and 8.

REFERENCE: Study Paper, ch. 12; Recommmendation 7.

SECTION 9: ALLOWANCE FOR IMPROVEMENTS

9.—(1) In an action for wrongful interference with goods where the subject goods have been improved by the person against whom the action is brought, or that person purchased the goods from the improver or from some one who derived his title from the improver, the court may make an allowance as provided for in this section to that person if he acted reasonably.

(2) Where goods have been recovered without a final order for recovery of possession, the person from whom they were so recovered may claim the allowance referred to in subsection (1) of this section.

(3) In determining reasonableness for the purposes of subsections (1), (2) and (7) of this section, the court may take account of, without being limited to, the following factors:

(a) whether or not the person seeking the allowance had an honest belief as to title;

(b) whether or not he knew or had reason to know of the interest of the person from whom he claims the allowance;

(c) whether or not he made any attempts to contact the holder of that interest; and

(d) whether or not the improvements in question were necessary.

(4) In determining whether or not to exercise its discretion to make an allowance under subsections (1) and (2), the court may take account of, without being limited to, the following factors:

(a) whether or not the person seeking the allowance had a contract under which he is to be or has been paid for the improvements himself;

(b) whether or not, but for any wrongful interference, the other person would have made the improvements himself;

(c) whether or not the improvements are or are likely to be of no value to the person from whom the allowance is being claimed; and

(d) whether or not the effect of the allowance would reasonably be to require the goods to be sold to pay for the allowance.

(5) The court may make an allowance in the form of an order for physical separation of the improvements on terms that the other person be reimbursed for the cost of repairing any physical injury excluding diminution in value of the whole caused by the absence of the improvements or by the necessity for replacement.

(6) The court, in making a monetary allowance, shall award the lesser of the cost of the improvements or the increase in the value of the goods attributable thereto except where, in the light of all the circumstances, including whether or not the person seeking the allowance was ignorant of any wrongfulness, the court considers that that would be unfair to that person and that a different basis should be employed.

(7) In proceedings by the purchaser of improved goods against his seller for recovery of the purchase price because of a failure of consideration, or in any other proceedings based on that failure of consideration, or for damages, the court, where it is appropriate, may make an allowance to the seller under this section if the seller acted reasonably.

(8) In determining appropriateness for the purposes of subsection (7) of this section, the court may take account of, without being limited to, the following factors:

(a) whether or not the purchaser has received an allowance under this section; and

(b) whether or not the seller would, had he been sued in an action for wrongful interference with goods, have received an allowance under this section.

SOURCE: *Torts (Wrongful Interference with Goods) Act 1977*, s. 6; *Personal Property Security Act, 1989*, s. 35(4).

REFERENCE: Study Paper, ch. 15; Recommendation 5.

SECTION 10: DEFENCE FOR GOOD FAITH INTERMEDDLERS

10.—(1) Subject to subsection (2) of this section and section 11, the person against whom a claim has been made in an action for wrongful interference with goods shall be entitled to show by way of defence that he reasonably believed in good faith that he or the person by whose

authority he was acting had or was acquiring a legally recognized interest in the goods, provided that that interest would have justified the wrongful interference complained of.

(2) The defence in subsection (1) of this section shall not apply to a merchant.

(3) For the purposes of this section a merchant is a person

(a) who deals in goods of the kind involved in the wrongful interference;

(b) who by his occupation holds himself out as having knowledge or skill appropriate to the practices or goods involved; or

(c) to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

(4) A person otherwise entitled to raise the defence referred to in subsection (1) of this section shall be entitled to do so in any claim for contribution, indemnity or damages against him including one arising on a breach of contract in respect of that person's otherwise wrongful interference.

SOURCE: New; for definition of merchant, see Draft Sales Bill, Ontario Law Reform Commission *Report on Sale of Goods* (1979), s. 1.1 (1) 18.

REFERENCE: Study Paper, ch. 11; Recommendation 6.

SECTION 11: DEFENCE NOT AVAILABLE TO PERSON IN POSSESSION

11.—(1) Subject to subsection (2) of this section, the defence in section 10 shall not of itself prevent the court from making a final order for recovery of possession in the action for wrongful interference with goods.

(2) Any final order for recovery of possession in an action for wrongful interference with goods in which the defence in section 10 is established shall be on terms that an allowance shall be made to the person from whom possession is recovered equal to the lesser of the price or, if the price was not in the form of money, its equivalent value in money, paid by that person for his interest in the goods or the value of the goods.

(3) Where goods have been recovered without a final order for recovery of possession, the person from whom they were so recovered may claim the allowance to which he would otherwise have been

entitled had a final order for recovery of possession been made as described in subsection (2) of this section.

SOURCE: Draft Sales Bill, *Report on Sale of Goods* (1979), s. 6.9.

REFERENCE: Study Paper, ch. 11, sec. 4, subsec. (c); Recommendation 6.

SECTION 12: RECOVERY BY PERSONS WITHOUT RIGHT TO POSSESSION

12.—(1) Subject to this section and section 13, in an action for wrongful interference with goods a party may claim recovery of possession whether or not he has a right to immediate possession of the goods.

(2) A party claiming recovery of possession in an action for wrongful interference with goods who does not have a right to immediate possession shall not be entitled to an order for recovery of possession if it appears that some other person with an interest in the goods objects to such recovery.

(3) Subject to the Rules of Civil Procedure the court may order that the other person referred to in subsection (2) of this section be joined as a party to the action.

SOURCE: New.

REFERENCE: Study Paper, ch. 7, sec. 2, subsec. (a); Recommendation 7.

SECTION 13: *PRIMA FACIE* RIGHT TO RECOVERY *IN SPECIE*

13.—(1) A successful party to an action for wrongful interference with goods who has claimed recovery of possession shall be entitled, at his option, to an order for the recovery of possession of the subject goods unless the court is satisfied that some other disposition is more appropriate, and the burden of satisfying the court that some other disposition is more appropriate shall be on the party resisting the order.

(2) In determining whether or not to exercise the discretion under subsection (1) of this section to make a disposition other than an order for recovery of possession, the court may take account of, without being limited to, the following factors:

(a) any alteration of the goods, any affixing of the goods to other goods or premises, or any improvement of the goods;

(b) the degree of fault or negligence of the parties;

(c) any failure of the party claiming recovery of possession to

obtain substitute goods when he could reasonably have done so;

(d) the effect of an order for recovery of possession on the creditors or others of the party against whom the order is sought; and

(e) the nature and extent of the interest in the goods of the party claiming an order for recovery of possession.

SOURCE: New.

REFERENCE: Study Paper, ch. 7, sec. 2, subsec. (b); Recommendation 8.

SECTION 14: *PRIMA FACIE* RIGHT TO INTERIM RECOVERY *IN SPECIE*

14.—(1) On the motion of any party in accordance with the Rules of Civil Procedure, upon a showing of a *prima facie* case of wrongful interference with goods, that party shall be entitled to an order for the interim recovery of possession of the subject goods unless the court is satisfied that some other disposition is more appropriate.

(2) In determining whether or not to exercise the discretion under subsection (1) of this section the court may take account of, without being limited to, the following factors:

(a) the nature of the goods;

(b) the conduct of the parties;

(c) the nature and extent of the interests of the parties in the goods; and

(d) any other matter which the court considers relevant.

SOURCE: New.

REFERENCE: Study Paper, ch. 7, sec. 3, subsecs. (b) and (c); Recommendation 9.

SECTION 15: RECAPTION AND INTERFERENCE WITH LAND OR GOODS

15.—(1) Subject to subsection (2) of this section, in any civil action for interference with property, real or personal, it shall be no defence that the interference took place in the course of taking possession of goods the refusal to deliver possession of which would be wrongful interference with goods on the part of the person from whom the goods were taken or to be taken.

(2) Notwithstanding subsection (1) of this section, but subject to subsection (3) of this section, in any civil action for interference with property, real or personal, which is in the nature of an action for nominal damages arising out of trespass to goods or land *per se*, it shall be a defence that the interference took place in the course of taking possession of goods the refusal to deliver the possession of which would be wrongful interference with goods on the part of the person from whom the goods were taken or to be taken.

(3) Notwithstanding subsection (2) of this section, the defence referred to in subsection (1) of this section shall not be available in circumstances where the interference with property is entry into a dwelling house.

(4) The liability of any person for an interference described in subsection (1) of this section other than his liability in a civil action as there referred to shall be determined without regard to this section.

SOURCE: New.

REFERENCE: Study Paper, ch. 10, secs. 3 and 4; Recommendations 15, 16 and 17.

SECTION 16: RECAPTION AND INTERFERENCE WITH THE PERSON

16.—(1) In any civil action for interference with the person it shall not be a defence that the interference took place in the course of taking possession of goods the refusal to deliver possession of which would be wrongful interference with goods on the part of the person from whom the goods were taken or to be taken.

(2) The liability of any person for an interference described in subsection (1) of this section other than his liability in a civil action as there referred to shall be determined without regard to this section.

SOURCE: New.

REFERENCE: Study Paper, ch. 10, sec. 2, subsec. (b); Recommendation 18.

SECTION 17: DEFENCE OF GOODS BY PERSON IN PEACEABLE POSSESSION

17. A person in peaceable possession of goods shall be justified in using reasonable and necessary force in defence of that possession except against a person or someone acting by that person's authority the refusal to deliver possession of the goods to whom would be a wrongful interference with the goods.

SOURCE: New.

REFERENCE: Study Paper, ch. 10, sec. 2, subsec. (c); Recommendation 19.

SECTION 18: DEFENCE RULES NOT WAIVABLE IN ADVANCE

18. Sections 15, 16 and 17 of this Act shall operate notwithstanding any licence or consent, express or implied, granted or given prior to the commencement of an attempt to take possession of goods.

SOURCE: New.

REFERENCE: Study Paper, ch. 10, sec. 5; Recommendation 20.

SECTION 19: RECOVERY ON BASIS OF INTEREST IN GOODS

19.—(1) Subject to this section and section 20, for the purposes of assessing damages or other monetary relief in an action for wrongful interference with goods, a person in such an action may claim recovery on the basis only of interference with his interest in the goods.

(2) Notwithstanding subsection (1) of this section, but subject to subsections (5) and (6) of this section and section 20, a person in an action for wrongful interference may claim recovery of damages or other monetary relief on the basis of absolute ownership of the goods even if he is not the owner if at the time of the wrongful interference he was in actual possession of the goods or had a right to immediate possession thereof.

(3) Notwithstanding subsection (1) of this section, but subject to subsections (4), (5) and (6) of this section and section 20, a person in an action for wrongful interference may claim recovery of damages or other money relief on the basis of an interest in the goods held by another person from whom he has authority in writing to claim on that person's behalf.

(4) A person relying on the authority referred to in the previous subsection of this section shall disclose that fact in his pleadings, and shall on request disclose to the person from whom relief is sought the terms of that authority.

(5) A person in an action for wrongful interference shall not recover damages or other monetary relief on the basis of an interest in goods of any other person if it appears that such other person objects to such recovery.

(6) Subject to the Rules of Civil Procedure, in any action for wrongful interference described in subsections (2) and (3) of this section the

court may order that the other person referred to in those subsections be joined as a party to the action.

(7) A person who gave the authority referred to in subsection (3) of this section shall be barred from any further action for the wrongful interference against the person from whom relief is sought.

SOURCE: New.

REFERENCE: Study Paper, ch. 12, sec. 6; Recommendation 21.

SECTION 20: RECOVERY FOR ACCOUNT OF ANOTHER PERSON

20.—(1) Where a person in an action for wrongful interference with goods recovers damages or other monetary relief on the basis of the interest of some other person, he shall hold in trust for that other person so much of the relief as is for interference with that interest.

(2) Where the other person referred to in subsection (1) of this section who is not barred by subsection (7) of section 19 from so doing brings an action for wrongful interference with goods against the person from whom damages or other monetary relief on the basis of his interest was recovered, that person shall be entitled to an indemnity from the original successful claimant, either in the action of the first person mentioned in this subsection, or in subsequent proceedings.

SOURCE: *Torts (Interference with Goods) Act 1977*, s.7.

REFERENCE: Study Paper, ch. 12, sec. 6; Recommendation 21.

SECTION 21: RIGHT TO POSSESSION SUFFICIENT FOR TRESPASS ACTION

21. A person may bring an action for wrongful interference with goods which might apart from this Act be styled trespass to goods notwithstanding that he only had a right to immediate possession of them.

SOURCE: New.

REFERENCE: Study Paper, ch. 2, sec. 3; Recommendation 22.

SECTION 22: TITLE TO SUE IN CONVERSION AND DETINUE

22.—(1) A person may bring an action for wrongful interference with goods which might apart from this Act be styled detinue notwithstanding

that he only had a right to immediate possession sufficient for an action for wrongful interference which might apart from this Act be styled conversion.

(2) A person may bring an action for wrongful interference with goods which might apart from this Act be styled conversion notwithstanding that he only had a right to immediate possession sufficient for an action for wrongful interference with goods which might apart from this Act be styled detinue.

SOURCE: New.

REFERENCE: Study Paper, ch. 3, sec. 2, subsec. (b) and sec. 3, subsec. (g); Recommendation 23.

SECTION 23: TITLE TO SUE IN CONVERSION

23. A person may bring an action for wrongful interference with goods which might apart from this Act be styled conversion notwithstanding that he only had an interest in the goods sufficient for an action for wrongful interference with goods which might apart from this Act be styled injury to a reversionary interest.

SOURCE: New.

REFERENCE: Study Paper, ch. 4, sec. 2, subsec. (a); Recommendation 24.

SECTION 24: PLEDGE AND CONVERSION

24. A person may bring an action for wrongful interference with goods which might apart from this Act be styled conversion notwithstanding that the interference was only a delivery or receipt of goods by way of pledge.

SOURCE: *Torts (Interference with Goods) Act 1977*, s. 11(2).

REFERENCE: Study Paper, ch. 3, sec. 3, subsec. (b); Recommendation 25.

SECTION 25: CO-OWNERS AND CONVERSION

25. A person who is a co-owner of goods may bring an action for wrongful interference with goods if the interference would have been sufficient for such an action by him if he were sole owner.

SOURCE: *Torts (Interference with Goods) Act 1977*, s. 10.

REFERENCE: Study Paper, ch. 3, sec. 3, subsec. (g); Recommendation 26.

SECTION 26: SHORT TITLE OF ACT

26. The short title of this Act is the *Remedies for Wrongful Interference with Goods Act, 19*

SOURCE: New.

REFERENCE: See Study Paper, ch. 16.

APPENDIX 2

THE *CHARTER* AND SELF-HELP REPOSSESSION

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1. INTRODUCTION

The right of recaption and the network of privileges and justifications which developed to aid in its exercise have always been controversial. As Branston noted, "in spite of all prohibition self-redress became an established remedy forcing its presence on a reluctant legal system."[1] The reluctance of the legal system to embrace the remedy of recaption stemmed from the experience that self-redress can provoke breaches of the peace. Despite this, the recaption remedy gained judicial protection because considerations of efficacy compelled its recognition; "this is a field of law which touches very closely the ordinary man's conception of his fundamental rights."[2]

The force of that pressure may have settled whether there would be a recaption remedy but it did not quell the controversy. This is because self-help repossession touches the ordinary person's conception of fundamental rights in conflicting ways. Not only does it vindicate the enforceability and integrity of the recaptor's superior right to possession but it also compromises the recaptee's "right" to challenge the recaptor's claim to that higher right to possession, and to be free from interference with his or her own property or person while the recaptor exercises the recaption remedy. Legislating in any area where the competing views are said to rest upon fundamental rights requires that careful regard be given to the requirements of the *Canadian Charter of Rights and Freedoms*.[3]

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[1] C.A. Branston, "The Forcible Recaption of Chattels" (1912), 61 L.Q.R. 262, at 265.

[2] English Law Reform Committee, *Eighteenth Report (Conversion and Detinue)*, Cmnd. 4774 (1971), para. 122.

[3] *Constitution Act, 1982*, Part I, as enacted by the *Canada Act, 1982*, 1982, c. 11 (U.K.), herein the "*Charter*".

The proposals affecting the self-help remedy of recaption are as follows:

1. A person having a higher right to possession of an item of personal property should be allowed to take that property through the exercise of self-help without prior judicial authorization, and the mere taking of the item of personal property will not alone ground any action in tort law against the recaptor.

2. Any defences available at common law protecting a recaptor from liability in tort law for damage done to the personal property or land of the recaptee should be abolished by statute.

3. A statutory provision should be enacted protecting recaptors from tortious liability for "trespasses *per se*" to personal property and land, so long as such trespasses are not in relation to dwelling houses.

The recaption proposals and the recaption regime that these proposals leave in place would, in my opinion, withstand constitutional attack. For some of the rules it is because there will be insufficient "governmental action" to ground a constitutional challenge. This is true of any challenges (made outside of the context of security agreement repossessions) to the mere fact that a recaption remedy is available. For the remainder of the rules it is because the rights and freedoms guaranteed under the *Charter* are simply not offended by these proposals. Challenges to the lack of procedural protections required before the exercise of self-help would fail primarily because, absent a complete about face in authority, the relevant provision of the *Charter*, section 7, does not protect pure economic or proprietary interests. Challenges based on section 8, the "unreasonable seizure" provision, would also fail because, quite simply, the regime recommended in these pages is a reasonable one. The apparent simplicity of those conclusions belies the complexity of analysis needed to sustain them.

2. THE *CHARTER* AND GOVERNMENTAL ACTION

(a) The Recommendation To Continue To Have A Remedy Of Recaption

The *Charter* does not apply generally to private disputes. The Supreme Court of Canada made it clear in *Dolphin Delivery*[4] that the *Charter* will not apply to private litigation unless there is some element of "governmental action". While there is a great deal of uncertainty as to what constitutes "governmental action"[5] this limit on the application of the *Charter* will

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[4] *Retail, Wholesale & Department Store Union, Local 580 et al.* v. *Dolphin Delivery Ltd.* (1986), 33 D.L.R. (4th) 174 (S.C.C.), herein "*Dolphin Delivery*".

[5] See the discussions in the following articles: Robert Howse, "*Dolphin Delivery*: The Supreme Court and the Public/Private Distinction in Canadian Constitutional Law" (1988), 46 University of Toronto Faculty of Law Review 247; Peter W. Hogg, "Who is

almost certainly insulate some of the recommendations made in this Study Paper from *Charter* review.

In particular, if the common law is relied upon to perpetuate aspects of the recaption regime, *Charter* review will probably not be possible with respect to those aspects. The ratio of *Dolphin Delivery* appears to be that the use by courts of common law rules to resolve disputes between private litigants is not enough to ground *Charter* review, at least not where the private litigant who is relying on the common law rule is not carrying on a governmental function.[6] On the other hand, there may well be sufficient government action to sustain a *Charter* challenge if a statute is passed which spells out the same rights as those provided for in the common law rule. This is because the passage of a statute will typically constitute sufficient governmental action to allow the *Charter* to perform its role of defining the parameters of governmental power.[7]

No statutory provision would be required to accomplish recommendation 1, which has the effect of continuing the availability of the remedy of recaption where no collateral torts are committed during the exercise of that remedy. This is because the entitlement to recapture goods to which the recaptor enjoys a superior right to possession represents the present common law position; the recaptee, having an inferior right to possession of the property, cannot complain that the recaptor is exercising a superior right to possess that property. Since there are no legal rules prohibiting self-help repossession, it follows that it is a lawful activity.

Even in the absence of a statutory provision authorizing the conduct in question it will be determined in some cases, however, that there is sufficient government action to warrant *Charter* review. It appears that this will occur where an apparently private actor is in fact carrying on a government function.[8] A private individual who is seeking to take possession of goods in

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Bound by the Charter" in *Your Clients and the Charter—Liberty and Equality* (Proceedings of the October 1987 Colloquium of the Canadian Bar Association in Montreal) Gerald-A. Beaudoin, ed. (Cowansville, Que,: Les Editions Yvon Blais Inc., 1987); Dale Gibson, "What Did Dolphin Deliver?" in *Your Clients and the Charter—Liberty and Equality* (Proceedings of the October 1987 Colloquium of the Canadian Bar Association in Montreal) Gerald-A. Beaudoin, ed. (Cowansville, Que.: Les Editions Yvon Blais Inc., 1987); Edward P. Belobaba, "The Charter of Rights and Private Litigation: The Dilemma of *Dolphin Delivery*" in *Charter Issues in Civil Cases*, Neil R. Finkelstein and Brian MacLeod Rogers, eds. (Toronto: Carswell, 1988).

[6] Peter W. Hogg, "Who is Bound by the Charter", *supra*, note 5, at 22.

[7] *Ibid.* at 23. See *Re Blainey and Ontario Hockey Association et al.* (1986), 54 O.R. (2d) 513 (Ont. C.A.) as an example. In *Dolphin Delivery*, *supra*, note 4, at 197, McIntyre J. explained the presence of state action in the *Blainey* case in this way:

> In the *Blainey* case, a lawsuit between private parties, the *Charter* was applied because one of the parties acted on the authority of a statute, i.e., s.19(2) of the Ontario *Human Rights Code, 1981*, which infringed the Charter rights of another.

[8] See the discussion of "government function" in *Re McKinney and Board of Governors of the University of Guelph* (1987), 63 O.R. (2d) 1 (Ont. C.A.).

order to vindicate his own superior right to possession is clearly not carrying on a governmental function so no governmental action sufficient to ground a *Charter* challenge can be found on this basis.[9]

Notwithstanding all of this, it is arguable that governmental action sufficient to support constitutional challenges to the very existence of a remedy of self-help recaption would be provided indirectly through the recommendations made in this Study Paper. To implement some of the recommendations, legislation would be required. In particular, it is recommended that certain defences available at common law be abolished by statute. There would therefore be legislation dealing with the subject matter of self-help repossession, and the question that emerges is whether this provides sufficient government action to allow the *Charter* to be used to vet the entire repossession or recaption regime.

There are some cases decided under the *Charter* which seem to suggest that where the government has legislated in an area, there is sufficient state action to challenge the legislation for not having gone far enough.[10] With respect to most *Charter* rights, however, this approach is certainly unconventional and probably incorrect.[11] It has the effect of imposing constitutional obligations on the government to enact particular laws, whereas the usual concept of a constitutional document like the *Charter* is to enable courts to act as a check or balance by telling government what it cannot do, not what it must do. As McIntyre J. said in *Dolphin Delivery*, "[The *Charter*] was intended to *restrain* government action and to protect the individual."[12] It follows that it would be inappropriate for a court to use particular legislative provisions which do not deny or interfere with any *Charter* rights or freedoms as an expedient for grabbing a foothold into the entire field.

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[9] It has been argued in the United States that permitting self-help repossession allows the government to avoid the constitutional doctrines which have been used successfully to challenge summary replevin proceedings. In this sense, allowing self-help amounts to a delegation of replevin authority to individuals and provides the necessary state action. (See B. Clarke and J. Landers, "Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution" (1973), 59 Va. L. Rev. 355). This argument has been rejected because repossession exists to permit the recaptor to facilitate his own purposes and not those of the government. See *Gibbs* v. *Titelman* 502 F. 2d 1107 (1974), *cert. denied*, 419 U.S. 1039.

[10] See, for example, *R.* v. *Pelley* (1983), 34 C.R. (3d) 385 (Ont. Co. Ct.) where s.4(5) of the *Canada Evidence Act*, R.S.C. 1970, c. E—10, was held to be unconstitutional because it only restricted comments on the accused's failure to testify and did not go farther and prohibit the drawing of adverse inferences related to that failure.

[11] The notable exception is section 15 of the *Charter*, the "equality rights" provision. It is possible to use section 15 to challenge a law because it gives a benefit to one group that another similarly situated group is not provided with. This was the essence of the constitutional challenges in *Re McKinney and Board of Governors of the University of Guelph* (1987), 63 O.R. (2d) 1 (Ont. C.A.) and *Re Blainey and Ontario Hockey Ass'n*, *supra*, note 7.

[12] *Supra*, note 4, at 191 (emphasis added).

The proposals in this report illustrate the inappropriateness of such initiatives. The only legislation proposed would increase protection for recaptees by abolishing certain defences that recaptors would have had at common law. It would be strange if the passage of legislation that is helpful to recaptees would provide a footing to bring constitutional challenges that could not have been brought if the more oppressive common law regime had remained unaltered.[13]

It follows, in my opinion, that those recaption proposals contained in this Study Paper that can be accomplished through continued reliance upon the common law regime will be immune from constitutional challenge. If the common law right to recaption grounds the remedy, then, nothing in this report would enable the availability of a remedy of recaption to be challenged under the *Charter*.

Having said this, it is probable that the situation is different with respect to the most common kind of recaption, namely, repossession pursuant to personal property security agreements. Section 58(a) of the *Personal Property Security Act*[14] provides:

> Upon default under a security agreement,
>
> (a) the secured party has, unless otherwise agreed, the right to take possession of the collateral by any method permitted by law; ...

This statutory provision has almost certainly provided sufficient governmental action to enable *Charter* challenges to be brought against the very existence of the self-help remedy when it is exercised in the security agreement context.

There is a great deal of uncertainty about when statutory involvement will provide sufficient governmental action to give rise to *Charter* jurisdictions. The competing views are complex and the concepts employed are subtle.[15] It may well be, for example, that a provision which merely incorporates the common law by reference does not provide sufficient governmental action to enable *Charter* review, whereas a provision that creates a new remedial entitlement does. The American cases dealing with constitutional challenges to Uniform Commercial Code section 9-503, the equivalent to our section 58(a), have systematically denied those challenges, primarily on the basis that the statute authorizes nothing: "The enactment of 9-503 by the respective states has been consistently construed almost unanimously to be the mere codification of existing private remedies and

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[13] This has been the position expressed in the United States. See W. Burke and D. Reber, "State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment" (1973), 47 So. Cal. L. Rev. 1, at 16.

[14] R.S.O. 1980, c.375.

[15] See the articles *supra*, note 5.

the pre-existing common law; and, therefore, not sufficient state action to compel invocation of the due process clause."[16]

The American approach is unlikely to be applied here, altogether apart from doubts about the direct applicability of American state action authorities.[17] Section 58(a) does more than merely codify the common law. At common law if the security arrangement was a chattel mortgage a right to repossession was implied whether provided for in the chattel mortgage or not[18] and in this sense section 58(a) has changed nothing. With respect to conditional sales contracts, however, any right to repossess had to be spelled out in the contract.[19] The *Personal Property Security Act* has effectively abolished this distinction by providing, for the first time, an automatic right to repossession in the case of all security agreements. In this material way it has gone beyond merely incorporating the common law regime. In my opinion this makes the American state action approach inapplicable to section 58(a) and renders section 58(a) vulnerable to constitutional challenge.

(b) Governmental Action And The Proposals To Legislate So As To Restrict Justifications Associated With Recaption

There would certainly be sufficient governmental action to warrant *Charter* review with respect to those recommendations that would have to be legislated. In particular, it has been recommended that legislation should be passed to abolish some of the defences to tort actions and quasi-criminal offences that were available at common law. The possible common law right of a recaptor to trespass in, or with respect to, a dwelling house, and the

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[16] R. Harrison, "Repossession under the U.C.C.: The Rights of the Creditor and Debtor" (1978), 17 J. Family L. 29, at 30. A Canadian case taking a similar approach is the British Columbia Court of Appeal decision of *Re Bhindi and B.C. Projectionists* (1986), 29 D.L.R. (4th) 47. In that case the *Charter* complainants wished to challenge the constitutionality of a closed shop labour arrangement made between private parties on the footing that it deprived employees of their freedom of association by requiring them to join a union. The government action was said to emerge from the existence of section 91(a) of the *Labour Code*, which allowed closed shop arrangements to be negotiated by employers and unions. Nemetz C. J., for the majority, held that the existence of section 91(a) did not provide sufficient governmental action because closed shop arrangements were not mandated by government action and did not reflect government policy but were merely the creatures of contractual arrangements between private individuals. A statutory provision that simply allowed for the creation of such arrangements did not provide sufficient governmental action.

[17] See, for example, the discussion of the American state action doctrine and its differences from the Canadian governmental action requirement in *Re Bhindi and B.C. Projectionists*, *supra*, note 16, at 56 *et seq*.

[18] *Alice* v. *Higgins* (1962), 33 D.L.R. (2d) 63 (B.C.C.A.).

[19] *Humphrey Motors Ltd.* v. *Ells*, [1935] S.C.R. 249.

common law right to do reasonable and necessary damage to the personal property of the recaptee in aid of recaption, would be abolished. The government action would be provided by the passage of statutory provisions that materially alter the common law and change the rights as between the parties. Whether these provisions are subject to *Charter* challenge, then, depends entirely upon their substance and not upon the preliminary jurisdictional question of governmental action.

There may be sufficient governmental action with respect to the proposal that a statutory provision be enacted to allow trespass *per se*. Whether this is so is uncertain because such a provision would do no more than confirm aspects of the existing common law. The present right to trespass upon land and goods and to do reasonable and necessary damage in the process incorporates an entitlement to trespass *per se*. Because legislation mirroring the common law position may ultimately be held to provide sufficient governmental action, it is possible that the constitutionality of the right to trespass *per se* in aid of recaption would be determined on the basis of its conformity with the rights and freedoms provided for in the *Charter*.

3. THE RECAPTION PROPOSALS AND THEIR COMPLIANCE WITH THE SUBSTANTIVE PROVISIONS OF THE *CHARTER*.

(a) INTRODUCTION

In this part I will consider broadly whether each of the proposals made in this Study Paper comport with the requirements of the substantive provisions of the *Charter*. This is important even with respect to those proposals that could be accomplished without legislation. The legislature should be aware of whether the regimes it endorses, even when not subject directly to *Charter* review, are consistent with the spirit of the *Charter*. There are arguably moral and political reasons why this should be so. Moreover, the Supreme Court of Canada has indicated that "the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the *Charter*."[20] In other words, the common law that is continued by implication in these proposals may well be transformed through the development of the common law doctrines where it falls short in reflecting *Charter* values.

(b) THE PROCESS-ORIENTED *CHARTER* CHALLENGE—THE FAIR HEARING ENTITLEMENT

In the United States, the major relevant constitutional challenge to personal property remedy regimes has been based on the procedural requirements of the due process clause. In the influential decision of

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[20] *Dolphin Delivery*, *supra*, note 4, at 198.

Sniadach v. *Family Finance Corp.*,[21] the United States Supreme Court relied upon the fourteenth amendment to the American Bill of Rights to invalidate a prejudgment garnishment procedure because it deprived the debtor of notice and of a prior hearing before garnishment. The debtor was left without an opportunity to challenge the existence of probable cause or to raise any defences before garnishment. Efforts to apply the same reasoning in the context of self-help regimes have failed, however, "in an overwhelming majority of the jurisdictions in which the issue has been explored".[22] This has been primarily because of the absence of sufficient state action to ground the constitutional attacks.[23] While the United States Supreme Court has not dealt directly with the issue,[24] dictum of Justice Stewart in a footnote in *Fuentes* v. *Shervin*,[25] the case where a replevin statute was struck down on due process grounds, is seen as an endorsement of the constitutionality of self-help repossession. Justice Stewart indicated that, while the replevin statute in question could not be relied upon:

> [t]he creditor could, of course, proceed...through self-help by 'distraining' the property before judgment.[26]

Because of the probability of the existence of governmental action related to the passage of section 58(a) of the *Personal Property Security Act*, the question of the constitutional significance of the failure of these proposals to provide procedural protections prior to the exercise of the recaption remedy will turn on the nature of the rights guaranteed by the *Charter*. It is unlikely that procedural complaints about the repossession process could be sustained. This is because such *Charter* challenges would have to be brought under section 7 of the *Charter* on the footing that the principles of fundamental justice require, among other things, that the rules of natural justice be honoured,[27] and that the rules of natural justice require a right to notice and to a hearing. Before a section 7 claim can be brought, however, it must be found that the procedure that is in derogation of the principles of

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[21] 395 U.S. 337 (1969).

[22] M. Huffmire, "Repossession under the U.C.C.: The Rights of the Creditor and Debtor" (1978), 15 Am. Bus. L.J. 321 at 323.

[23] See, for example: *McCormick* v. *First National Bank*. 332 F. Supp. 604 (S. D. Fla. 1971); *Arcorn* v. *Peters* 829 F. 2d. 671 (8th Cir. 1987).

[24] *Certiorari* has been denied in a number of cases. See, for example: *Shirley* v. *State National Bank*, 493 F. 2d 793 (2nd Cir. 1974), *cert. denied*, 419 U.S. 1009 (1974); *Gibbs* v. *Titelman*, 502 F. 2d 1107 (3rd Cir. 1974), *cert. denied*, 419 U.S. 1039 (1974); *Nowlin* v. *Professional Auto Sales Inc.*, 496 F. 2d 16 (8th Cir. 1974), *cert. denied*, 419 U.S. 1006 (1974); *Adams* v. *S. Cal. First National Bank*, 492 F. 2d 324 (9th Cir. 1974), *cert. denied*, 419 U.S. 1006 (1974).

[25] 407 U.S. 67 (1983).

[26] *Ibid.*, at 79, fn. 12.

[27] See *Reference re Section 94(2) of the Motor Vehicle Act (B.C.)*, [1985] 2 S.C.R. 486; David M. Paciocco, *Charter Principles and Proof in Criminal Cases* (Carswell: Toronto, 1987), at 107.

fundamental justice imperils the "life, liberty or security of the person" of the *Charter* complainant.[28] The bulk of authority suggests that, whatever the concepts of liberty and security of the person contemplate, they do not refer to the protection of economic or proprietary interests[29] which are unconnected to the integrity of the individual in a non-economic sense.[30]

The Supreme Court has yet to settle the question. In *Reference Re Public Service Employee Relations Act (Alta.)*.[31] Dickson C.J.C. said of a general submission that the *Charter* does not protect associational activity related to economic ends:

> If by this it is meant that something as fundamental as a person's livelihood or dignity in the workplace is beyond the scope of constitutional protection, I cannot agree. If, on the other hand, it is meant that concerns of an exclusively pecuniary nature are excluded from such protection, such an argument would merit careful consideration.[32]

The prevailing view and the sentiment expressed in this passage make it extremely unlikely that the existence of a self-help remedy of recaption could be challenged under section 7. Even where there is a sufficient governmental action to raise *Charter* questions there is no substantive *Charter* right to ground a challenge that is based on concerns related to procedural fairness.

(c) Unreasonable Search And Seizure

An alternative basis for attacking the constitutionality of the various proposals would be the protection against unreasonable search or seizure

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[28] *Reference re Section 94(2) of the Motor Vehicle Act (B.C.)*, *ibid*.

[29] See, for example: *Re Homemade Wine Crafts (Canada) Ltd. and A.G.B.C.* (1986), 26 D.L.R. (4th) 468 (B.C.S.C.); *Re Aluminum Company of Canada Ltd.* v. *H.M.T.O. and Dofasco Inc.* (1986), 55 O.R. (2d) 522 (Ont. Dist. Ct.); *Gershman Produce Co. Ltd.* v. *Motor Vehicle Transport Board*, [1986] 1 W.W.R. 303 (Man. C.A.); *Smith Kline & French Laboratories Ltd.* v. *A-G. Canada* (1986), 24 D.L.R. (4th) 321 (F.C.T.D.); *R.* v. *Quesnel* (1986), 24 C.C.C. (3d) 78 (Ont. C.A.).

[30] In *Wilson* v. *Medical Services Commission* (5 August 1988, B.C.C.A., not yet reported), it was held that while section 7 does not extend to protect property or pure economic rights, it does embrace individual freedom of movement including the right to choose one's occupation and to pursue it, subject to reasonable restrictions implemented in accordance with the principles of fundamental justice. In that case the *Medical Services Act*, S.B.C. 1985, c.255 was held to be unconstitutional because it had the effect of depriving medical doctors of those rights in an unreasonable manner. The violation of section 7, then, was not because of interference with proprietary or pecuniary rights, but despite that, such rights were implicated.

[31] [1987] 3 W.W.R. 577.

[32] *Ibid*., at 618.

housed in section 8 of the *Charter*.[33] The American equivalent, the fourth amendment, has been the battleground for a number of challenges to the Uniform Commercial Code's repossession provision.[34]

It is obvious that the taking of property is a "seizure"[35] and that both the fact of taking and the manner of taking property can be subject to section 8 review.

In *Hunter* v. *Southam Inc.*[36] it was held that before a search or seizure could be unconstitutional it had to interfere with an interest protected by section 8 of the *Charter*. Without prejudging what other interests section 8 might protect, the Court held that section 8 exists at least in part to protect "reasonable expectations of privacy".[37] The existence of a reasonable expectation of privacy is determined both subjectively, in the sense that the person subject to the search or seizure must be found to have had an expectation of privacy, and objectively, in the sense that a reasonable person in the position of the person subject to the search or seizure would have had such an expectation.[38] In *Bertram S. Miller Ltd.* v. *R.*[39] it was recognized that, in the context of "seizures", section 8 also protects "one's right to undisturbed possession".[40]

It seems clear that the mere existence of a remedy of recaption, that is available only to persons having a superior right to possession to that of the recaptee, cannot ground a section 8 complaint. The "objective" leg of the "reasonable expectation of privacy" test could not be satisfied. It is inconceivable that a reasonable person in the position of a recaptee could expect that his privacy interests related to the enjoyment of the chattel would be undisturbed by persons having superior rights to possession. Nor does the

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[33] That provision provides:

> Everyone has the right to be secure against unreasonable search or seizure.

[34] See, for example: *McCormick* v. *First National Bank*, 332 F. Supp. 604 (S.D. Fla. 1971); *Messenger* v. *Sandy Motors Inc.*, 121 N.J. Supp. 1, 295 A 2d 402 (1972); *Charles* v. *Odom* 664 F.S. 751 (1987). In each case the challenges involved repossession rights pursuant to security agreements and the cases turned on the valid consent to the seizures that the recaptees had given by entering into the security agreements.

[35] In *Bertram S. Miller* v. *R.* (1986), 28 C.C.C. (3d) 263, at 289–90, 293–94 (B.C.C.A.) it was held that the exercise of the power of administrative officers pursuant to regulations made under the *Plant Quarantine Act*, R.S.C. 1970, c. P–13, to confiscate and destroy plants imported into the country constituted "seizures". The court, not surprisingly, inferred that the gravamen of a "seizure" was the interference with one's "undisturbed possession" of a thing.

[36] [1984] 2 S.C.R. 145.

[37] *Ibid.*, at 159.

[38] *R.* v. *Sanelli* (1987), 38 C.C.C. (3d) 1 (Ont. C.A.).

[39] *Supra*, note 35.

[40] *Ibid.*, at 290.

recaptee have a "right to undisturbed possession" such as that contemplated in *Bertram*. It follws that section 8 does not protect any presently recognized interests that could be jeopardized by the mere act of retaking by a person with a higher right to possession.

While this rules out the possibility of successful section 8 challenges to the very *existence* of the remedy of reception, it does not remove the prospect of section 8 challenges being brought against the permissible *methods* of recaption. In particular, the proposals advanced here remove the right of the recaptee to complain against trespasses *per se* to his or her land or goods that are done in aid of recaption. These proposals clearly implicate the reasonable expectation of privacy that a recaptee would have in the exclusive possession of that land or those goods and compromise the right to undisturbed possession which the ownership of the land or goods trespassed against implies.

Merely determining that a search or seizure interferes with a reasonable expectation of privacy, however, does not end the section 8 analysis. There remains the question of whether the interference is "reasonable" or not.

In *Hunter* v. *Southam Inc.* the Court held that the standard of reasonableness has at least two specific implications. First, where it is feasible to obtain a prior judicial authorization before a neutral and detached judicial officer, "such authorization is a pre-condition for a valid search or seizure".[41] Second, it requires, as expressed in the criminal context, that no search or seizure be allowed unless there are reasonable and probable grounds to believe that there has been a criminal offence committed and that evidence would probably be found at the place to be searched.[42]

The "*prima facie*" warrant requirement suggests that, if prior judicial authorization is feasible in the case of self-help recaptions involving trespasses *per se*, those trespasses would be unconstitutional without prior judicial authorization. This would jeopardize the constitutionality of any statute that allowed trespasses *per se* in aid of recaption. The influence of *Hunter*'s "*prima facie*" warrant requirement has been circumscribed, however. *Hunter* involved a quasi-criminal investigation with a view to potential prosecution. There have been a number of cases of high authority which have held that while a warrant requirement is understandable in the context of criminal and quasi-criminal investigations, it is not defensible in the context of the enforcement of administrative or regulatory schemes.

The interference with privacy interests in the context of criminal and quasi-criminal investigations is more substantial because it "involves an element of the protection against self-incrimination", implicates concerns

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[41] *Supra*, note 36, at 159.

[42] *Ibid.*, at 165–68.

about overzealous use of official power in the search for evidence and inevitably stigmatizes the person searched.[43] Furthermore, it makes sense to require the existence of reasonable and probable grounds to believe that an offence has occurred given that the purpose is to gather evidence, and it is prudent in such cases to have a prior judicial determination of the existence of reasonable cause.[44] Moreover, at common law the powers of search and seizure associated with the investigation of crime were narrowly circumscribed, and this tradition suggests a strict regime of controls on current police powers.[45]

The situation is quite different in the context of administrative inspections. The inspector is often conducting spot checks to ensure compliance with licensing or other regulatory requirements and this would make the prior judicial authorization meaningless since the very notion of a "spot check" contradicts the existence of reasonable and probable grounds.[46] Prior judicial authorization in every case where there is no emergency would be expensive and time consuming, thereby seriously diminishing the utility of many regulatory schemes.[47] Moreover, the entry of the inspectors can typically be denied by the persons whose lands or premises are to be subject to the search, thereby taking much of the heavy handed appearance away from these statutory regimes.[48] The inappropriateness of a warrant requirement is particularly compelling where the powers of inspection do not extend to a dwelling house.[49] For all of these reasons, appellate courts have held that for administrative searches and seizures, the relatively inflexible warrant requirement would be replaced by a general "reasonableness" standard,[50] and so too, by implication, would the reasonable and probable cause standard.

Recaption seizures have more in common with administrative procedures than with criminal investigations. There are no "self-incrimination" or police power issues in the context of private recaption and there is no tradition of restraint in powers of search and seizure in the context of recaption as there is with respect to state investigative powers. In fact, the proposals made here are more restrained than the powers associated with recaption that are available at common law. Moreover, a regime that would disallow mere entry to the property of recaptees in aid of recaption would

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[43] *R.* v. *Bichel* (1986), 4 B.C.L.R. (2d) 132, at 143 (B.C.C.A.).

[44] *Re Belgoma Transportation and Dir. of Employment Standards* (1985), 20 D.L.R. (4th) 156 (Ont. C.A.).

[45] *R.* v. *Quesnel* (1986), 24 C.C.C. (3d) 78, at 83 (Ont. C.A.).

[46] *Bichel*, note 43, at 144.

[47] *Ibid.*, at 142.

[48] *Re Belgoma Transportation*, *supra*, note 44, at 159.

[49] *Ibid.*

[50] See, for example, *Bertram S. Miller*, *supra*, note 35, at 289.

render many if not most self-help recaptions impossible, thereby increasing the use of time-consuming and expensive proceedings. For all of these reasons the recaption proposals are unlikely to be tested by the *prima facie* warrant requirement but, as with administrative searches and seizures, will be assessed on the basis of their "reasonableness".

It is almost certain that the proposals relating to interference, without damage, to the land and goods of the recaptee would be held to be "reasonable". The removal of the defence in cases where damage is done and the refusal of the proposals to countenance trespasses to dwelling houses are significant restrictions that, in my view, underscore the restrained and reasonable nature of the proposals. The common law prohibition on the use of force against the person in aid of recaption would also render the remedy unavailable where a recaptee confronted a recaptor who was about to trespass in aid of recaption. As in the administrative search context, this makes the powers of trespass that much more benign. Moreover, the statutorily confirmed defence of recaption available to these recaptors who are sued for "trespasses *per se*" that is contemplated by these proposals requires more than reasonable and probable grounds to believe that the recaptee has taken the goods; the defence is available only if the recaptor is correct and has, in fact and in law, a superior right to possess the goods. In this sense, the proposals are stricter than what section 8 of the *Charter* would require.

For all of these reasons it is probable that section 8 challenges to the remedy of recaption, and to its permissible forms of exercise, would prove unsuccessful.

4. SUMMARY

The following recaption proposals are almost certainly constitutionally valid, for the following reasons:

1. A person having a higher right to possession of an item of personal property should be allowed to take that property through the exercise of self-help without prior judicial authorization, and the mere taking of the item of personal property will not alone ground any action in tort law against the recaptor.

Where the recaption is not in the context of a security agreement, there is insufficient governmental action to ground a constitutional challenge. Where there is a security agreement, there is sufficient governmental action provided by section 58(a) of the *Personal Property Security Act*. Challenges to the absence of procedural protections associated with the remedy would fail because section 7 of the *Charter* does not protect purely proprietary interests. Section 8 unreasonable search and seizure protections would fail because section 8 does not protect any interests that are compromised by

this proposal, given that the recaptee does not have a reasonable expectation of privacy relating to the possession of such goods, or a right to undisturbed possession in those goods.

2. Any defences available at common law protecting a recaptor from liability in tort law for damage done to the personal property of the recaptee should be abolished by statute.

It is inconceivable that the *Charter* could be relied upon to impose a duty on the state to allow recaptors to do reasonable damage in aid of recaption. There is no relevant right or freedom provided by the *Charter* that could be used to ground a challenge to this provision.

3. A statutory provision should be enacted protecting recaptors from tortious liability for "trespasses *per se*" to personal property and land, so long as such trespasses are not in relation to dwelling houses.

While this proposal does interfere with reasonable expectations of privacy and furnish sufficient governmental action to sustain a *Charter* challenge, a section 8 claim would fail because the *prima facie* warrant requirement would give way in this context to a general assessment of the reasonableness of a recaption regime that would allow such trespasses. The limited privileges provided to a recaptor by this proposal are likely, in my opinion, to be found to be reasonable.